Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

HORACE SHAW, JR.,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Maryland

PETITION FOR WRIT OF CERTIORARI

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140 pp

QUESTIONS PRESENTED

(1) Did the Maryland Court of Appeals improperly determine reasonable articulable suspicion existed under the facts of the instant matter, and in doing so, create a standard wherein factors such as "extreme nervousness" and "overwhelming" odors cannot be properly judicially reviewed?

(2) Did the Maryland Court of Appeals improperly find probable cause to search existed in the instant matter and fail to consider whether and/or when probable cause, if it existed at all, dissipated?

PARTIES

In addition to the parties set forth in the caption to this writ, a list of all parties to the proceeding below whose judgment is the subject of this petition is as follows:

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Hagerstown, Maryland 21746
1-301-733-2800

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The Petitioner, Horace Shaw, Jr., respectfully prays this Honorable Court grant a writ of certiorari to review the judgment and opinion of the Maryland Court of Appeals entered on August 29, 2002.

OPINIONS BELOW

The August 29, 2002, opinion of the Maryland Court of Appeals,[1] which is reported at *Nathan v. State of Maryland*, 370 Md. 648, 805 A.2d 1086 (Md. 2002).[2], is set out at pages 1a-20a of the Appendix to this petition. (Petitioners' Appendix A). The dissent to the opinion of the Maryland Court of Appeals is set out at pages 21a-40a of the Appendix to this petition. (Petitioners' Appendix A).[3]

The June 05, 2001, opinion of the Maryland Court of Special Appeals, which was not officially

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[1] The Maryland Court of Appeals Order, dated October 08, 2002, denying, without comment, the Petitioner's request to reconsider is set out page 100a of the Appendix to this Petition. (Petitioners' Appendix E).

[2] Petitioner refers to the case as *Nathan v. State of Maryland* because in the official citation it is noted as such. The reason for this is the Maryland Court of Appeals issued one (1) opinion in conjunction with the separate appeals of the Petitioner and Corinthius Nathan, the other individual in the vehicle with Petitioner.

[3] The Order granting the State of Maryland's writ of certiorari to the Maryland Court of Appeals in this matter, reported at *State of Maryland v. Shaw*, 365 Md. 266, 778 A.2d 382 (Md. 2001)., was dated August 15, 2001, and is set out at pages 97a-99a of the Appendix to this petition (Petitioner's Appendix D).

reported but noted here as *Horace Shaw, Jr., v. State of Maryland*, 282, September Term, 2000 (Md. Ct. Spec. App., June 05, 2001)., is set out at pages 41a-66a of the Appendix to this petition. (Petitioners' Appendix B). The dissent to the opinion of the Court of Special Appeals of Maryland is set out at pages 67a-73a of the Appendix to this petition. (Petitioners' Appendix B).

The written opinion, which was also not officially reported, of the Honorable Daniel M. Long, of the Circuit Court for Somerset County (sitting in Wicomico County by designation), dated March 09, 2000, is set out pages 74a-96a of the Appendix to this petition. (Petitioners' Appendix C).

GROUNDS FOR JURISDICTION

The Petitioner is Horace Shaw, Jr. The Respondent is the State of Maryland.

The jurisdiction of this Honorable Court is invoked in the instant matter, reported as *Nathan v. State of Maryland*, 805 A.2d 1086 (Md. 2002), pursuant to 28 U.S.C. § 1257(a). The Maryland Court of Appeals decided the case on August 29, 2002. Subsequently, a timely rehearing/reconsideration was sought by Petitioner, Horace Shaw, Jr. The Petitioner's request for reconsideration was denied, without comment by the Maryland Court of Appeals, on October 08, 2002. No extension has been requested, or granted, with regards to the time in which this Petition is to be filed.

An issue, sufficiency of the evidence to sustain the trial level conviction, unrelated to the issues raised for review in this petition was remanded to the Maryland Court of Special Appeals, the State of Maryland's intermediate Appellate Court, for consideration.[4] This issue is still pending before the Maryland Court of Special Appeals.

CONSTITUTIONAL PROVISIONS

This case involves the fourth Amendment to the Constitution of the United States of America, which provides as follows: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons of things seized.

The Fourth Amendment to the Constitution of the United States of America is applicable to the State of Maryland[5] through the so-called "incorporation clause" of Section 1 of the Fourteenth Amendment of

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[4] The Maryland Court of Special Appeals previously did not rule on this issue because it found the search and seizure issue raised by the Petitioner, Horace Shaw, Jr., required reversal. (Pet. App. 42a).

[5] *See; Mapp v. Ohio*, 367 U.S. 643 (1961); *Wolf v. Colorado*, 338 U.S. 25 (1949).

the Constitution of the United States of America which provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection under the laws."

STATEMENT OF THE CASE

The underlying case stems from the arrest, and subsequent conviction of the Petitioner, Horace Shaw, Jr. (hereinafter, "Shaw" or "the Petitioner"). The arrest of Shaw took place on July 14, 1999, and was the result of a traffic stop. The traffic stop was initiated for a minor violation (speeding) of the traffic laws of Maryland. (Pet. App. 77a). The traffic stop culminated with the interior ceiling panels of a van Shaw was a passenger in being ripped apart by a Maryland State Trooper, Sgt. Mike Lewis. At the time of this extremely invasive search, Shaw was sitting on the side of the road, in handcuffs, guarded by Maryland State Trooper, Tfc. Robert Penny.

Prior to trial Shaw timely filed a Motion to Suppress. A hearing on Shaw's Motion to Suppress was held on November 05, 1999. Briefs, and associated materials, on the issues argued at the hearing were submitted for consideration by the court, at the court's request, after the hearing. In a written opinion, dated March 09, 2000, Shaw's Motion to Suppress was denied by the Honorable Daniel M. Long, of the Circuit Court for Somerset County (sitting in Wicomico County by designation). Judge Long found probable cause existed for the search in the instant case based the detaining officers' observations of the Petitioner, the individual driving the vehicle the Petitioner was in and the vehicle itself. (Pet. App. 89a-93a).

On March 20, 2000, Shaw was tried and found guilty by a jury, presided over by the Honorable D. William Simpson (of the Circuit Court of Wicomico County). On March 28, 2000, the afore-mentioned Judge Simpson sentenced the Petitioner to a term of incarceration totaling twenty-five (25) years, fifteen (15) of those years without the possibility of parole. (Pet. App. 43a, 44a).

An appeal of the conviction was timely noted with the Maryland Court of Special Appeals wherein the Petitioner raised a number issues including the issues advanced in this Petition. (Pet. App. 50a-66a). In an unreported opinion dated June 05, 2001, the intermediate appellate court reversed the decision of

the trial court ruling the detaining officers observations of the vehicle seized, when combined with his observations of the Petitioner did not warrant a finding of probable cause to search. (Pet. App. 50a-66a).

The State of Maryland sought review of the Maryland Court of Special Appeals ruling in this matter by way of a Petition for writ of certiorari to the Maryland Court of Appeals. The Maryland Court granted said Petition on August 15, 2001. (Pet. App. 97a-99a).

On August 29, 2002, the Maryland Court of Appeals reversed the decision of the intermediate appellate court in a written opinion. The Maryland Court of Appeals found probable cause existed to search in the instant matter based on the detaining officer's observations that Petitioner and the driver acted suspiciously[6] and said officer's belief the vehicle the Petitioner was traveling in contained a secret compartment. (Pet. App. 17a).

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[6] The suspicious activity the Maryland Court of Appeals referred to was based on the following factors: the fact that the driver of the vehicle was unable to produce identification, the driver's and Shaw's "extreme nervousness," Shaw's apparent pretense of sleep when the vehicle was initially stopped, the driver's evasive answers about his travel plans, inconsistent travel versions of vehicle's journey, the "overwhelming" odor of air freshener and alterations to the vehicle. (Pet. App. 15a).

The circumstances surrounding the Petitioner's arrest, the pertinent underlying facts of the case, are as follows;[7] On Wednesday, July 14, 1999, at approximately 8:15 p.m., Shaw was a passenger in a conversion van[8] driven by Corinthius Nathan (hereinafter "Nathan" or "the driver"). (Pet. App. 77a). At the time of the stop, Shaw was lying down in the rear of the van. (Pet. App. 78a). Sgt. Mike Lewis (hereinafter, "Sgt. Lewis" or "the detaining officer"), a Maryland State trooper, testified he paced the van traveling 70-71 miles per hour in a posted 60 mile per hour zone. While the trooper was "pacing" the van, the vehicle allegedly drifted onto the shoulder. As a result, Sgt. Lewis activated the cruiser's police lights and initiated a traffic stop. Sgt. Lewis also reported one of the van's brake lights was out and, he thought, the van took too long to stop. (Pet. App. 77a).

After the van stopped, Sgt. Lewis approached the van on the passenger's side and spoke to the driver,

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[7] The facts surrounding the vehicle stop and the events subsequent thereto were largely undisputed at all stages of the proceedings below because the entire incident was video taped (with sound). (Pet. App. 76a). An outline of the videotape was prepared by Petitioner for the lower courts and submitted to said courts at every level of the proceedings below. *See;* Memorandum Exhibit A at suppression level, set out here as pages 101a-105a of the Appendix to this petition. (Petitioners' Appendix F).

[8] The conversion van in this case is a 1988 Dodge Ram Van with a raised roof, working television and working video game system. (Pet. App. 77a).

Nathan. Sgt. Lewis informed Nathan of the reason for the stop and asked Nathan for his license and registration. Nathan could not produce a driver's license. Sgt. Lewis inquired about passengers in the van; at which time Shaw moved to the front of the van. Sgt. Lewis requested Shaw's information and Shaw provided his (Shaw's) driver's license and the registration card for the van. Sgt. Lewis kept Shaw's license and the registration. (Pet. App. 77a, 78a). **Sgt. Lewis ordered Shaw to "sit tight"** and requested Nathan step out of the vehicle and onto the shoulder of the road. Sgt. Lewis questioned Nathan regarding his (Nathan's) identity[9] and matters unrelated to the traffic stop, such as the origin and destination of the van's trip. (Pet. App. 78a). Sgt. Lewis subsequently patted Nathan down for officer safety.

After speaking with Nathan, and before Sgt. Lewis questioned Shaw, Sgt. Lewis believed criminal activity was afoot. Sgt. Lewis expressed the reasons for his suspicions as being Nathan's lack of identification, chest palpitations, trembling hands and carotid artery pulsing. (Pet. App. 78a). Sgt. Lewis returned to the van to interrogate Shaw separately about the van and the trip. Nathan was left on the side of the road in between the van and police cruiser watched by Maryland State Trooper Tfc. Robert Penny (hereinafter, "Tfc. Penny"). Sgt. Lewis testified Nathan's version of

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[9] Sgt. Lewis obtained Nathan's full name, date of birth and social security number

the van's journey differed from Shaw's and Shaw appeared nervous. (Pet. App. 79a). Sgt. Lewis further testified when he spoke to Shaw, he (Sgt. Lewis) spoke in a low tone so Nathan could not hear what was being said.

Sgt. Lewis requested Shaw consent to a search of the van for guns and drugs, stating: **"We have a big problem with guns and drugs up and down this highway. I'm getting ready to get a bit to eat but I was going to check another vehicle real quick. Do you mind if I check the vehicle for guns and drugs real quick and I'll have you guys on your way. We check them all the time."** (Pet. App. 50a). Shaw submitted to Sgt. Lewis' request. (Pet. App. 55a). Sgt. Lewis asked Shaw to exit the vehicle and patted Shaw down for weapons (officer safety). (Pet. App. 79a). No weapons or contraband were discovered and Shaw was directed to the side of the road near Nathan. Shaw and Nathan were then guarded by Tfc. Penny.

Sgt. Lewis entered the van and conducted his first search of the vehicle. Sgt. Lewis then exited the vehicle and returned to his patrol car. Three (3) times Sgt. Lewis entered the van and searched it without finding any guns or drugs. On at least one (1) of these occasions, Sgt. Lewis entered the van with a screwdriver. (Pet. App. 79a). Sgt. Lewis admitted when he took the screwdriver from his cruiser to the van, he (Sgt. Lewis) intentionally kept the screwdriver hidden from Shaw and Nathan. (Pet. App. 56a).

Before entering the vehicle a fourth time, and **more then eight (8) minutes after the stop was initiated,** Sgt. Lewis told Shaw and Nathan he (Sgt. Lewis) would have the detainees on their way shortly and finally starts calling in (to the dispatcher) the information obtained from Shaw and Nathan. Before receiving any answer on the information, Sgt. Lewis then informed Shaw and Nathan the tags on the vehicle were stolen. Sgt. Lewis knew this statement was untrue. At this time, Sgt. Lewis **handcuffed** Shaw and Nathan on the basis of the van's "stolen tags". **Sgt. Lewis was admittedly lying** to Shaw and Nathan. (Pet. App. 57a, 58a). **Sgt. Lewis had no information disputing the suspect's valid ownership of the van prior to the arrest and handcuffing.** Shaw and Nathan were ordered to sit on the ground, and were again guarded by Tfc. Penny.

Sgt. Lewis then told Shaw he (Sgt. Lewis) would tear open the ceiling if Shaw did not reveal how to open the suspected compartment. Shaw replied, "I don't know what you are talking about." (Pet. App. 59a). Sgt. Lewis then entered the van a fourth and fifth time. Sgt. Lewis searched around the front of the van, but did not search any of the baggage in the vehicle. Sgt. Lewis then began tearing at the front overhead console (map light, etc.) with a claw hammer.[10] After

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[10] Sgt. Lewis testified at the suppression hearing that he had recently found a secret compartment in a conversion van where the entrance to the compartment had been behind the front overhead console. Sgt. Lewis further testified that he tore down

pulling said console down and **finding nothing**, Sgt. Lewis noted he could not believe it, that is where he (Sgt. Lewis) thought the compartment would be located. Sgt. Lewis then began tearing apart the panel holding a working television. After forcibly removing the panel holding the television, Sgt. Lewis recovered narcotics from a space behind the panel. The narcotics were found **roughly nineteen (19) minutes** after the initial traffic stop. (Pet. App. 80a). No citations were issued at the scene of the stop.[11]

ARGUMENT IN SUPPORT OF GRANTING THE WRIT OF CERTIORARI

The Maryland Court of Appeals improperly determined reasonable articulable suspicion existed in the instant matter, and in doing so, created a standard wherein factors such as extreme nervousness and overwhelming odors cannot be judicially reviewed.

The stop of an automobile and detention of its occupants constitutes a "seizure" for Fourth

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the front overhead console in the present case expecting to find an entrance to a secret compartment Finding nothing, Sgt. Lewis then forcibly pulled down the panel holding the van's television and video game system, which was located behind the van's front seats.

[11] The driver of the van, Nathan, was given a citation later at the station.

Amendment analysis even when purpose of the stop is limited (i.e. to issue a traffic citation) and the actual detention time is brief. *See; Whren v. United States*, 517 U.S. 806 (1996).

It is clear from the inception of the traffic stop at issue in this case the Petitioner was detained. This Honorable Court has stated, "In order to determine whether a reasonable person would have felt free to disregard the police... it is necessary to focus on what the person's 'business' was; only then may we determine if the police questioning and conduct at issue would likely have impeded that person's freedom to proceed with such business." *See; Michigan v. Chesternut*, 486 U.S. 467, 578, (1988); *Florida v. Bostick*, 501 U.S. 434 (1991); *Immigration & Naturalization Service v. Delgado*, 466 U.S. 210, 218 (1984).

In the instant matter, Shaw's "business" was to continue on his way down the interstate to his ultimate destination. With the driver of Shaw's detained vehicle being held at a police cruiser by an armed uniformed officer, and Sgt. Lewis holding Shaw's license, it was impossible for Shaw to "go about his business." More Importantly, Sgt. Lewis ordered Shaw to "sit tight." Under these circumstances, it is unreasonable to think Shaw, a black out-of-state suspect, would feel free to walk away form the officers down an interstate highway and leave his means of travel, his license, registration and companion behind. Under the totality of the circumstances Shaw was simply not free to leave.

Under the facts of this case, no reasonable person in Shaw's position would believe he/she could "just walk away" from two (2) armed police officers. It is clear Petitioner was detained, for the purposes of constitutional analysis, from the moment Sgt. Lewis told Shaw to "sit tight," and stopped investigating the traffic stop to interrogate Shaw on unrelated matters. Therefore, in order to justify the continued detention[12] of the Petitioner, Sgt. Lewis required either a valid consent to search or, at a minimum, reasonable articulable suspicion. *See; Terry v. Ohio*, 392 U.S. 1 (1968).[13]

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[12] The Petitioner does not contend his initial detention, based on the stop of vehicle for a violation of the traffic laws, was improper. Rather, Petitioner addresses his continued detention on a matter unrelated to the traffic stop. *See; United States v. Sharpe*, 470 U.S. 675 (1985); *Florida v. Royer*, 460 U.S. 491 (1983).

[13] Petitioner is mindful of the fact he (Petitioner) purportedly consented to a "real quick" search of the vehicle detained. Petitioner, however, addresses the issues presented herein in this matter because the Maryland Court of Appeals determined reasonable suspicion ripening into probable cause and exigent circumstances justified the search of the vehicle, it did not discuss at any length the consent issue. (Pet. App. 4a). Therefore, the Maryland Court of Appeals did not treat this matter as a consent issue. Furthermore, the Maryland Court of Appeals specifically declined to rule on the issue of whether the nature and scope of any consent validly given was exceeded by Sgt. Lewis' extremely invasive search. (Pet. App. 16a). If this Honorable Court were to grant the relief sought herein and ultimately determine no probable cause to search existed, Petitioner asserts this matter would have to be remanded back to the Maryland Court of Appeals for a finding of whether any validly received consent was exceeded.

This Honorable Court recently discussed the concept of reasonable articulable suspicion in *United States v. Arvizu*, 534 U.S. 266 (2002). In *Arvizu*, this Court again re-iterated that in making reasonable suspicion determinations, courts must look at the totality of the circumstances of each individual case to determine whether a detaining officer has a particularized and objective basis for suspecting wrongdoing.[14]

In the present case, the Maryland Court of Appeals determined Sgt. Lewis had a reasonable suspicion based on the following factors: the fact that the driver of the vehicle was unable to produce identification, the driver and Shaw's "extreme nervousness," Shaw's apparent pretense of sleep (when the vehicle was initially stopped), the driver's evasive answers about his travel plans, inconsistent travel versions of vehicle's journey, the "overwhelming" odor of air freshener and alterations to the vehicle.[15] (Pet. App. 15a). Looking at these

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[14] In *Arvizu*, this Honorable Court again declined to provide a detailed definition of reasonable suspicion. Rather, the Court noted the likelihood of criminality needs to be rooted in more than a mere hunch, but need not rise to the level of probable cause.

[15] A review of Sgt. Lewis' searches and detentions from January of 1995 through September of 1999, from Sgt. Lewis's Form 130s (Form 130s are reports of every search conducted by the Maryland State Police.) indicates Lewis relied on one or more of these factors to justify 114 of the 147 automobile searches he conducted during that period (74% of the time). Interestingly, of the 114 times Lewis relied on these factors to justify the search, Sgt. Lewis failed to

factors under the totality of the circumstances, it is clear Sgt. Lewis did not have a particularized and objective belief that the Petitioner was involved in any wrongdoing (either possession of guns or narcotics).

Initially, Petitioner points out the Maryland Court of Appeals should have not imputed any factors involving the driver of the vehicle to a reasonable suspicion analysis of the Petitioner. The findings that driver of the vehicle was evasive regarding his travel plans, gave a different travel itinerary than the Petitioner, the driver's "extreme" nervousness and the driver's inability to produce identification simply have no bearing on whether the officer developed a justifiable reason to detain the Petitioner. If anything, the fact the Petitioner was able to produce

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find drugs or contraband 84 times (70% of time). On those occasions when Sgt. Lewis did find drugs, 16 times other, more obvious, indicators of criminality (i.e., smell or sight of drugs, rental car violations, arrestable traffic offenses, "wanted" occupant, etc.) were present. Based on Sgt. Lewis's past experience, Sgt. Lewis was aware nervousness, etc., are not reliable indicators of criminality. *See;* Memorandum Exhibit B at suppression level, set out here as pages 106a-107a of the Appendix to this petition. (Petitioners' Appendix F). Sgt. Lewis' repetitive use of these factors in the great majority of his (Sgt. Lewis') vehicle searches indicates these observations are mere pretense to justify a search. Interestingly, Tfc. Penny, the officer who guarded Shaw and Nathan, did not notice any physical factors noted by the Sgt. Lewis, and the Maryland Court of Appeals accepted, to justify the continued detention of Shaw and Nathan (as well as, the search of the seized vehicle).

identification and provided the officer with the vehicle's information should have weighed in Shaw's favor under the totality of the circumstances.

Similarly, Shaw's asserted pretense of sleep adds little to an analysis of reasonable suspicion. There is no way the officer could know whether Shaw had been asleep before the initial stop in this case. More importantly, Petitioner can find no reasonable basis for this assertion entering the required analysis. Shaw did not attempt to hide from the officer, voluntarily moved to the front of the seized vehicle and complied with Sgt. Lewis' every direction. If Sgt. Lewis was concerned for his safety, this concern obviously quickly dissipated. Sgt. Lewis did not immediately ask the Petitioner to exit the vehicle, or search the Petitioner for a weapon, as was his right to do.[16] Furthermore, Sgt. Lewis left the Petitioner in the vehicle while he removed the driver for questioning.

The Maryland Court of Appeals characterization that Shaw was "extremely" nervous was also an insufficient basis upon which to build reasonable suspicion. Petitioner acknowledges this Honorable Court has found types of nervous, evasive, behavior pertinent in the consideration of reasonable suspicion. For example, In *Illinois v. Wardlow*, 528 U.S. 119 (2000)., this Court found a suspect's running away from law

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[16] *See; Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Maryland v. Wilson*, 519 U.S. 408 (1997).

enforcement officers, in conjunction with the suspect's presence in an area known for narcotics sales, was sufficient to establish reasonable articulable suspicion.[17] In the instant case, however, Shaw did not exhibit the same type of evasive behavior found in *Wardlow*. Rather, in the instant case the Petitioner was the victim of a far more subjective standard. In this matter, the allegation against Shaw was that he merely acted "extremely" nervous.

Prior to ruling on the instant case, the Maryland Court of Appeals addressed the issue of nervousness in *Ferris v. State*, 355 Md. 356, 735 A.2d 491 (Md. 1999). In finding nervousness, or the lack thereof, wanting as a basis of reasonable suspicion, the Maryland Court of Appeals noted:

> suspicion based on nervousness is unjustified and cannot support detention of a suspect. As Judge Sonner stated in *Whitehead v. State*: "nervousness, or lack of it, of the driver pulled over by a Maryland State trooper is not sufficient to form the basis of police suspicion that the driver is engaged in the illegal transportation of drugs. There is no earthly way that a police officer can distinguish the nervousness of an ordinary citizen . . . from the nervousness

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[17] In *Wardlow*, however, this Honorable Court declined to create a *per se* nervousness rule.

of a criminal who traffics in narcotics." 116 Md. App. 497, 698 A.2d 1115 (1997).

-*Ferris*, 355 Md. at 388.

Petitioner urges this Honorable Court to adopt the view nervousness espoused in *Ferris* and treat claims of "extreme" nervousness with even more caution. Petitioner asserts it is impossible for a law enforcement officer to either assess, or determine, an individual's nervousness level (especially when, as in the instant matter, the law enforcement officer has had no previous contact with the individual) in such a general sense.

The clear suggestion by the Maryland Court of Appeals is that while nervousness is of limited use in the determination of reasonable suspicion under a given set of facts, "extreme" nervousness, as determined by a law enforcement agent and not the court, is highly relevant in the analysis of reasonable suspicion. Permitting law enforcement officers to make determinations such as this, the level and/or character of a detainee's nervousness, effectively removes the role of judicial review.

Petitioner asserts, it is a vastly different circumstance when law enforcement officers observe an individual evasively running away from them in a high-drug area, as was the case in *Illinois v. Wardlow*, compared to a law enforcement officer merely

testifying, as in the instant case, that in his/her opinion the suspects appeared "extremely nervous." In the first case, the suppression court is given circumstances upon which it can exercise its role as an independent fact finder, in the latter case (the instant matter) the same court cannot. The reason; in the first case (based on *Illinois v. Wardlow*), the suppression court can examine the facts; that the suspect was in a high drug area, observed law enforcement agents and ran away, and make an independent evaluation under the totality of the circumstances. In the instant case, the suppression court will now pre-suppose, at a minimum, reasonable suspicion because a law enforcement officer characterizes nervousness as "extreme" whether said officer has any basis (either through past experience with the suspect or some type specialized training) for that finding or not.[18]

Quite simply, giving credence to law enforcement observations concerning the subjective character and nature of a suspect's nervousness will permit those same law enforcement officials to establish reasonable suspicion and/or probable cause based on nothing more than the clever use of adjectives and/or adverbs. Petitioner asserts such a situation would effectively replace the rule of law with the rule

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[18] No scientifically based evidence was offered at any level of these proceeding to demonstrate observations of nervousness are indicative of criminal behavior. Petitioner notes, however, Sgt. Lewis testified there are types of nervousness that indicate criminal activity.

of men and render the Fourth Amendment to the Constitution of the United States meaningless.

The Maryland Court of Appeals also found reasonable suspicion existed in the instant matter, in combination with the other factors discussed herein, due to the presence of air fresheners in the vehicle detained. Specifically, the Maryland Court of Appeals seemed concerned with the fact the detaining officer, Sgt. Lewis, was "overwhelmed" with the odor of air freshener in the vehicle detained.

Initially, Petitioner notes four (4) air fresheners were located in the detained vehicle, a full size van.[19] Two (2) of the air fresheners were located in the front of the van and two (2) were located in the rear of the van. Shaw states, the presence of air fresheners in and of itself is meaningless to a determination of reasonable suspicion and/or probable cause. The mere presence of air fresheners could never lead to more than a mere hunch, even if combined with other relevant factors. Certainly, however, Petitioner acknowledges the number of air fresheners in a vehicle, or their positioning, could possibly create a relevant factor for consideration in an individual case. For example, if a compact vehicle contained a large quantity of air fresheners, Petitioner concedes this information

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[19] To be specific, the vehicle was a 1988 Dodge Ram Van with a raised roof and working entertainment system (television and video game system).

combined with other pertinent factors could lead to a reasonable suspicion.

In the instant case, as was the case with "extreme" nervousness already discussed herein, the Maryland Court of Appeals again ceded the relevant importance of the presence of air fresheners to the detaining officer.

The Maryland Court of Appeals did not find the presence, number or position of air fresheners important to the reasonable suspicion determination, rather the Maryland Court of Appeals found it pertinent that the detaining officer was "overwhelmed" by the odor of air freshener. Petitioner states this type of highly subjective determination confers a level of discretion to police not grounded in any legitimate expertise and assures a finding not susceptible to any meaningful judicial review.

Under the ruling in the instant case the Maryland Court of Appeals again conducted no independent analysis[20] and blindly accepted the characterization of Sgt. Lewis.[21]

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[20] In *Ornelas v. United States*, 517 U.S. 690 (1996)., this Honorable Court noted reviewing courts must view the facts observed by law enforcement agents from the point of view of a reasonable police officer.

[21] The obvious inference Sgt. Lewis wanted drawn from his feeling/sensation of being "overwhelmed" by the odor of air freshener was the one the Maryland Court of Appeals found, that

Again, permitting determinations based on such a subjective observation will permit law enforcement officials to establish reasonable suspicion and/or probable cause based on nothing more than the colorful use of the English language. Petitioner asserts such a situation renders judicial review nothing more than a rubber stamp for law enforcement.[22]

For all of these reasons, the Maryland Court of Appeals improperly found reasonable articulable suspicion existed for the continued detention of the Petitioner.[23]

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the passengers of the vehicle detained were attempting to hide something.

[22] Petitioner addresses the issue of the alteration to the vehicle in question in the section of this brief dealing with probable cause because the van alteration was the ultimate factor in the determination of probable cause in the instant matter.

[23] Justice Marshall, with whom Justice Brennan joined in the dissent in *United States v. Sokolow*, 490 U.S. 1, (1989), provides the appropriate language to appreciate the absurdity of Sgt. Lewis's "suspicions" in the instant matter and the Maryland Court of Appeals reliance on them:

> Reflexive reliance on a profile of drug courier characteristics runs a far greater risk than does ordinary, case-by-case police work, of subjecting innocent individuals to unwarranted police harassment and detention. This risk is enhanced by the profile's "chameleon-like way of adapting to any particular set of observations." Compare, e.g., *United States v. Moore*, 675 F.2d 802, 803 (CA 6 1982, *cert. denied*, 460 U.S. 1068 (1983) (suspect was first to deplane), with *United States v. Mendenhall*, 446 U.S. 544, 564, (1980) (last to deplane, with

The Maryland Court of Appeals improperly found probable cause existed in the instant matter and did not consider whether and/or when probable cause, if it existed at all, dissipated.

United States v. Buenaventura-Ariza, 615 f.2d 29, 31 (CA2 1980) (deplaned from middle); *United States v. Sullivan*, 625 F.2d 717, 7210 (CA6 1980) (one-way tickets), with *United States v. Craemer*, 555 F.2d 594, 595 (CA6 1977) (round-trip tickets), with *United States v. McCaleb*, 552 F.2d 717, 720 (CA6 1977) (non-stop flight), with *United States v. Sokolow*, 808 F.2d 1366, 1370 (CA9 1987), *vacated* 831 F.2d 1413 (CA9 1987) (changed planes); *Craemer, supra*, at 595 (no luggage), with *United States v. Sanford*, 658 F.2d 342, 343 (CA5 1981), *cert. denied*, 455 U.S. 991, 102 S.Ct. 1618 (1982) (gym bag), with *Sullivan, supra*, at 12 (new suitcases); *United States v. Smith*, 574 F.2d 882, 883 (CA6 1978) (traveling alone), with *United States v. Fry*, 622 F.2d 1218, 1219 (CA5 1980) (traveling with companion); *United States Andrews*, 600 F.2d 563, 566 (CA6 1979), *cert. denied sub nom. Brooks v. United States*, 444 U.S. 878, 100 S.Ct 166 (1979) (acted nervously), with *United States v. Himmelwright*, 551 F.2d 991, 992 (CA5), *cert. denied* 434 U.S. 902, 98 S.Ct. 298 (1977) (acted too calmly). In asserting that it is not "somehow" relevant that the agents who stopped Sokolow did so in reliance on a prefabricated profile of criminal characteristics, the majority thus ducks serious issues relating to a questionable law enforcement practice, to address the validity of which we granted certiorari in this case.

-*Sokolow*, 490 U.S. 1, 109 S.Ct. at 1588-89.

The Maryland Court of Appeals improperly determined Sgt. Lewis had probable cause for the highly invasive search in the instant matter.

Absent a valid consent, probable cause is required for a warrantless search of an automobile. This Honorable Court has stated the "*Carroll*[24] doctrine" (which provides for the warrantless searches of automobiles) includes "a 'probing search' of compartments and containers within automobiles as long as the search ***is supported by probable cause.***" *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982 (1991), *quoting, United States v. Ross*, 456 U.S. 798 (1982). Probable cause is a practical, common sense decision whether, given all the circumstances..., there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

In the instant case, the Maryland Court of Appeals concluded probable cause existed for the highly intrusive search of the vehicle Shaw was a passenger in because of Sgt. Lewis' observations of the van's ceiling and Petitioner and Nathan's suspicious behavior. (Pet. App. 71a).

Petitioner hereby asserts, Sgt. Lewis' hunch that the vehicle in question contained a hidden overhead compartment does not amount to probable cause,

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[24] *Carroll v. United States*, 267 U.S. 132 (1925).

when considered in conjunction with the factors used by the Maryland Court of Appeals to establish reasonable articulable suspicion, that such a compartment existed (and that the suspected compartment contained contraband). There was nothing facially unusual about the overhead compartment and panel that housed the television and video game systems. (Pet. App. 62a). Furthermore, all of the electronic equipment in the van was operational at the time of the stop in question. (Pet. App. 62a).

Petitioner states there is nothing unusual about the owner of a van refurbishing the vehicle by adding televisions, entertainment systems, etc. Common sense dictates if such a refurbished vehicle houses an entertainment system, the panel holding a television and entertainment system necessarily has to rigid and strengthened to hold said equipment. More importantly, any modification such as this would automatically presume space behind it to house the wiring and components.

The Maryland Court of Appeals, in finding the suspected presence of a compartment tipped the scales in favor of a finding of probable cause in the instant case, has essentially formulated a standard whereby any customization, alteration or upgrade to a vehicle will now constitute "a fair probability that contraband or evidence of crime will be found in a particular place" as long as a law enforcement says the passenger was extremely nervous and a strong odor of air

freshener was present (regardless of how many air fresheners are ultimately found). This standard offends any fundamental protection offered by the fourth Amendment to the United States Constitution because it places all manner of innocent drivers at risk for unwarranted governmental intrusion.

The Maryland Court of Appeals maintained, at least in part, Sgt. Lewis's probable cause was rooted in his past experience with hydraulic compartments. Part of this experience is Sgt. Lewis's discovery of an overhead compartment during the traffic stop of a separate van four (4) weeks before the vehicle Shaw was in was stopped. (Pet. App. 17a). By way of background, Sgt. Lewis discovered a compartment in the **modified front overhead console** of that vehicle during a traffic stop. As in the instant case, Sgt. Lewis tore out the overhead console and found a hidden compartment. In fact, during the stop in the present case Sgt. Lewis repeatedly makes reference to this van being "just like the last one."[25]

In this case, Sgt. Lewis, relying on the "training and experience" of the earlier stop, developed the hunch that all vans with newly customized overhead consoles must also contain secret compartments (and that all of these compartments must contain contraband). Following this hunch, Sgt. Lewis, used a

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[25] *See;* Memorandum Exhibit A at suppression level, set out here as pages 101a-105a of the Appendix to this petition. (Petitioners' Appendix F).

claw hammer to try and tear down the front overhead console. When this hunch yielded nothing,[26] Sgt. Lewis, without further "training and experience" to rely on, began to tear down the panel and upholstery which housed the van's television and computer games. Shaw asserts herein any suspicions regarding hidden compartments that may have been justified by Sgt. Lewis's prior traffic stop, or any other factors in this case, completely dissipated after Sgt. Lewis tore down the front overhead console and found no compartment.

Even if this Honorable Court was to agree with the Maryland Court of Appeals that Sgt. Lewis did have probable cause prior to Sgt. Lewis' attempt to tear out the front console, which Shaw submits Sgt. Lewis did not, said probable cause did not exist afterward (before Sgt. Lewis discovered any contraband in a separate area).

Probable cause does not exist indefinitely in a vacuum. When Sgt. Lewis tore out a portion of the vehicle the Petitioner was a passenger in and did not

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[26] Sgt. Lewis was so sure he was going to find some contraband when he (Sgt. Lewis) tried to open this portion of the van that on the police video tape it is clear Sgt. Lewis could not believe it, because that is where Sgt. Lewis thought the compartment would be located. *See;* Memorandum Exhibit A at suppression level, set out here as pages 101a-105a of the Appendix to this petition. (Petitioners' Appendix F).

discover a hidden compartment any probable cause ceased to exist. It is important to remember here, the initial reason for the intrusion in this matter was routine traffic stop for a violation of the traffic laws. This Honorable Court has stated such instructions must be temporary and last no longer than necessary to effectuate the purpose of the stop. *See; Florida v. Royer*, 460 U.S. 491 (1983).[27]

As previously noted, probable cause is a practical, common sense decision whether, given all the circumstances..., there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). If Sgt. Lewis had developed probable cause, said probable cause ended when Sgt. Lewis tore out the front section of vehicle's ceiling. Obviously, Sgt. Lewis believed he would find a hidden compartment in this particular place in the vehicle. When Sgt. Lewis did not discover a compartment in this particular place, the search should have ended. Any legitimate reason for the continued intrusion in this matter had dissipated and more than a reasonable amount of time had expired to justify the purpose for the initial stop (ostensibly, to issue a traffic citation).

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[27] Petitioner certainly acknowledges seizures of this nature can be extended by a valid consent or the development of reasonable suspicion and/or probable cause.

In blessing Sgt. Lewis' continued dismantling of the vehicle the Petitioner was in, the Maryland Court of Appeals has disallowed the basis upon which all search and seizure law is predicated, reasonableness. Quite simply, it was unreasonable for Sgt. Lewis to continue his highly destructive and intrusive search of the vehicle Shaw was in after dismantling the front overhead section of vehicle's ceiling and finding no contraband. It was Sgt. Lewis, based upon the totality of the circumstances, applying his knowledge, training and experience, who determined a hidden compartment would be located in the front section of vehicle's ceiling, not the detainees. When Sgt. Lewis did not find a secret compartment in this are of the vehicle, all of his subsequent actions constituted nothing more than a fishing expedition not supported by probable cause.

Petitioner states permitting the continuation of searches in cases of this manner would subject all types of innocent citizens to protracted unreasonable seizures based upon nothing more than a hunch. Worse, no framework is established delineating when a seizure should appropriately end. Under the ruling of the Maryland Court of Appeals in the instant case, it is conceivable that once a search is initially justified by probable cause, it can continue indefinitely until the detaining officer is satisfied, with no protection, reasonable or otherwise, afforded to a detainee.

As the ultimate search that revealed contraband in the instant matter was unsupported by probable cause, it constituted an unreasonable search in violation of the Fourth Amendment and should not have been upheld by the Maryland Court of Appeals.

CONCLUSION

For the reasons stated herein, Petitioner respectfully represents a writ of certiorari should issue to review the judgment and opinion of the Maryland Court of Appeals.

Respectfully submitted

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

September Term, 2001

No. 42

Corinthious James NATHAN,

v.

State of Maryland.

No. 61

STATE of Maryland,

v.

Horace Shaw, Jr.

August 29, 2002

Argued before BELL, C.J., ELDRIDGE, RAKER, WILNER, CATHELL, HARRELL and BATTAGLIA JJ.

RAKER, Judge

In this case, we again address the constitutional limitations on searches and seizures conducted during the course of a traffic stop. Petitioner Corinthious James Nathan and respondent Horace Shaw, Jr. were convicted of multiple drug possession and importation charges in the Circuit Court for Wicomico County, following the court's denial of their motions to suppress evidence seized as the result of a traffic stop and search of the van that Nathan was driving and in which Shaw was a passenger.

The trial court denied the motions to suppress on the grounds that the scope of the initial investigative detention was reasonable, that Shaw consented to the search of the van, and that the officer had reasonable and articulable suspicion for the continued detention and investigation of Nathan and Shaw and probable cause for the search of the van's ceiling. Because we agree that the initial traffic stop was valid and that the police had reasonable suspicion for the continued detention of Nathan and Shaw and probable cause for the search of the van's ceiling, we shall hold that the search and seizure of the evidence from the vehicle was lawful.

I.

On July 14, 1999, at approximately 8:15 p.m., Nathan was driving a 1988 Dodge van owned by Shaw, who was a passenger in the van at the time. Nathan and Shaw were traveling south on U.S. Route 13 near Salisbury, Maryland, where Police Sergeant Mike Lewis and Trooper First Class Robert Penny were parked in an unmarked police cruiser.

While seated in the parked car, Sgt. Lewis heard what he described as the sound of a vehicle traveling at an apparent high rate of speed. Sgt. Lewis and Tfc. Penny pursued the vehicle along the Route 13 bypass, pacing it at approximately seventy miles per hour in a marked sixty-miles-per-hour zone. Sgt. Lewis testified that he observed the vehicle drift across the shoulder of the roadway on two occasions and that he noted that the left brake lamp was out on the van.[1]

Sgt. Lewis activated his emergency equipment and stopped the van. While effecting the stop, Sgt. Lewis noticed that there

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[1] Defense counsel presented to the suppression court, as well as this Court, a videotape of the traffic stop, recorded by the camera affixed to Sgt. Lewis' cruiser.

was a passenger in the rear of the vehicle who raised and lowered his head.

Sgt. Lewis approached the vehicle on the passenger side and asked the driver, Nathan, for his license and registration. The officer testified that, when Nathan lowered the passenger side window, the odor of air freshener coming from the interior of the vehicle was overwhelming. He testified that he observed a conversion ceiling in the roof of the van that appeared to be lower than normal. The blue fabric around the ceiling of the eleven-year-old van appeared to be new and extremely tight, with no evidence of fading or sagging.

Sgt. Lewis observed the passenger in the back of the van, Shaw, lying beneath a couple of light travel bags and a blanket. Sgt. Lewis asked him to move to the front of the van. Sgt. Lewis testified that Shaw acted like he was asleep and that when asked if he had identification, Shaw provided him with the vehicle registration, which was in Shaw's name, and some additional documentation.

Sgt. Lewis asked Nathan to exit the vehicle and to move to the rear of the van. Sgt. Lewis testified that he noticed that Nathan's carotid artery was pounding on both sides of his neck, that his chest was palpitating, and that his hands were trembling. He testified that Nathan would not make eye contact with him and that he was unable to produce a driver's license or other form of identification.

Sgt. Lewis questioned Nathan about the origin of his trip. Nathan first told him that he was coming from New York, then said that he actually was coming from New Jersey. Nathan said that he and Shaw were in New Jersey to pick up the van and that they were taking it back to get the oil checked. Sgt. Lewis testified that Nathan answered many of his questions with questions, which in his experience indicated deception.

Sgt. Lewis then questioned Shaw concerning the origin of his trip. Shaw responded that he and Nathan were coming from New York and that they had driven to New York in a rental vehicle to pick up the van. Sgt. Lewis testified that he noticed Shaw's hands trembling while he was talking to him, his carotid artery pounding, and a nervous twitch above his eye. He asked Shaw if he would consent to a "quick check" of his vehicle for guns and drugs. Shaw agreed and stepped from the van.[2] Sgt. Lewis patted Shaw down for weapons.

Sgt. Lewis entered the van on the driver's side. He hit the ceiling over the driver's seat with his hand and observed that it was solid and hard, with no flexibility. Sgt. Lewis testified as to his experience with false compartments and their significance to him. The Court of Special Appeals summarized his testimony as follows:

> "He stated that the fact that the ceiling was solid and had no 'give' at all suggested that it had been reinforced by steel. Sgt. Lewis testified that, since 1995, he had searched approximately nine to twelve hydraulically controlled false compartments in van ceilings. Although he found traces of narcotics in all of these compartments, he found a quantity of narcotics only in [Shaw]'s. He located guns and currency in some cases, and he stated that 'many were empty.' In Sgt. Lewis' experience, this type of construction is only used for hydraulic compartments, and these compartments are only used for transporting contraband. Sgt. Lewis believed that no one would have a legitimate reason to have such a reinforced

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[2] Because probable cause and exigent circumstances justified the search of Shaw's vehicle, the validity of the search did not depend upon Shaw's purported consent. *See Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 1323-24, 75 L. Ed. 2d 229 (1983).

> ceiling put in a conversion van. Thus, once he had knocked on the ceiling of the van, he became quite convinced that there was a compartment."

Sgt. Lewis testified that some of the hidden compartments that he had searched concealed guns and currency, and some were empty, but each one contained traces of narcotics. He attempted to shift the console and found that he was unable to pull it down. He testified that he believed that it was affixed permanently with steel plates or rods.

Sgt. Lewis testified that he left the van to get a flashlight to examine the ceiling. Upon returning, he tried and failed again to move the console. He left the van again and returned with a screwdriver to attempt to pry open the console. When he was unable to move the console, he returned to his vehicle and called for backup and requested information on the vehicle and its occupants.

Sgt. Lewis went over to Nathan and Shaw to tell them that the tags on the van indicated that it was stolen. He handcuffed Nathan and Shaw and placed them in "investigative detention." Sgt. Lewis admitted that he had no information that the vehicle was stolen and that his only purpose in securing Nathan and Shaw was to prevent a physical confrontation. Once he had placed handcuffs on Nathan and Shaw, Sgt. Lewis told them that he knew that there was a secret compartment in the van and asked them for the code to open it. He advised both men that, if they did not tell him the code, he would have to rip open the ceiling. Nathan and Shaw did not respond, and Sgt. Lewis then tore open the ceiling where he subsequently discovered a secret compartment containing 4.8 kilograms of cocaine and 193 grams of pure heroin wrapped in gray duct-taped packages. At approximately 8:34 p.m., nineteen minutes after stopping the vehicle, Sgt. Lewis placed Nathan and Shaw under arrest,

advised them of their *Miranda* rights, and transported them to the Maryland State Police Barracks in Salisbury.

Prior to trial, Nathan and Shaw filed motions to suppress the physical evidence found at the scene of the traffic stop on the grounds that it was seized illegally in violation of the Fourth Amendment and Article 26 of the Maryland Declaration of Rights. The trial court denied their motions to suppress on the grounds that the scope of the initial investigative detention of Nathan and Shaw was reasonable, that Shaw freely and voluntarily consented to the search of the van, and that the officer had reasonable and articulable suspicion for the continued detention of Nathan and Shaw in order to investigate possible criminal activity at the time that Shaw was asked to exit the vehicle and probable cause to believe that weapons and drugs were present in order to search the van's ceiling.

Following separate jury trials, Nathan and Shaw were found guilty of ten counts relating to the importation and possession of cocaine and heroin. Both men noted appeals to the Court of Special Appeals.

The Court of Special Appeals affirmed Nathan's convictions in an unreported opinion. Judge Ellen Hollander, writing for the panel, found that, by the time the detention had been prolonged beyond the permissible scope of the initial traffic stop, Sgt. Lewis had the requisite reasonable, articulable suspicion necessary to prolong his investigation, in light of his observations and training, which led him to believe that he had detected a hidden compartment that was being used for an illicit purpose. The intermediate appellate court also found, based on the totality of the circumstances, that Sgt. Lewis had probable cause to believe that the roof of the van contained contraband, which rendered his warrantless search of the van lawful.

A different panel of the Court of Special Appeals reached a contrary conclusion and, in an unreported opinion, reversed

Shaw's convictions. The intermediate appellate court found that, by the time that Sgt. Lewis began his extensive questioning of Nathan and Shaw regarding their travel plans, his focus had shifted from a traffic stop to a narcotics investigation and that he did not possess the articulable suspicion required for their continued detention. With regard to the search of the van, the court found that Shaw initially had consented voluntarily to the search, but that, by the time Sgt. Lewis had begun to dismantle the ceiling of the van, the consent had "expired" and Sgt. Lewis did not have the necessary probable cause to continue without it.

In dissent, Judge Moylan wrote:

> "[O]n the facts of this case based on the evidence before the suppression hearing judge in this case, the discovery of a hydraulically-controlled and reinforced hidden ceiling compartment in the conversion van *ipso facto* generated probable cause to believe that the van may have contained contraband so as to justify a warrantless, and perhaps painstakingly thorough, search of it under *Carroll v. United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925)."

Although Judge Moylan would find probable cause based on the presence of this "unexplained 'vehicular hidden bank vault,'" he concluded by noting that, when he considered the other factors surrounding this stop in addition to the hidden compartment, his probable cause determination became even stronger.

We granted certiorari in both cases primarily to determine whether the stop and detention of Nathan and Shaw violated the Fourth Amendment and whether the police had reasonable suspicion or probable cause to believe that the occupants of the van were trafficking in guns or drugs. *State v. Shaw*, 365 Md.

266, 778 A.2d 382 (2001); *Nathan v. State*, 364 Md. 534, 774 A.2d 408 (2001). We shall affirm *Nathan* and reverse *Shaw*.

II.

Nathan and Shaw argue that Sgt. Lewis violated their Fourth Amendment rights by immediately suspending the ostensible traffic stop in favor of an investigatory detention. They argue that the police clearly detained them beyond the permissible scope of a traffic stop. They also argue that the fact that their vehicle was a conversion van, when coupled with other innocuous facts, did not give the police reasonable, articulable suspicion or probable cause to believe that they were trafficking in guns or drugs. Finally, they argue that Shaw's assent to Sgt. Lewis' request to conduct a "real quick check" for guns and drugs did not authorize him to rip open the ceiling of the van.

The State argues that Sgt. Lewis' conduct during the initial traffic stop, including ordering Nathan out of the vehicle and questioning Nathan and Shaw regarding their destination and purpose, was reasonable. The State also argues, based on the totality of the circumstances after the initial conversations with Nathan and Shaw, that Sgt. Lewis had reasonable suspicion to continue the encounter. Finally, the State argues that, once Sgt. Lewis had made an initial inspection of the van's ceiling, he had probable cause to conduct his more thorough search, and that Shaw's consent to the search of the van was voluntary.

III.

Our review of the Circuit Court's denial of the motion to suppress evidence under the Fourth Amendment is based solely upon the record of the suppression hearing. *See* In re *David S.*, 367 Md. 523, 529, 789 A.2d 607, 610 (2002). In *Wilkes v. State*, 364 Md. 554, 774 A.2d 420 (2001), we reiterated the standard of review of a ruling upon a motion to suppress:

> "In our review of the trial court's denial of [a] motion to suppress, we are limited to the record of the suppression hearing. We review the facts found by the trial court in the light most favorable to the prevailing party . . . . We extend great deference to the fact finding of the suppression court and accept the facts as found by that court unless clearly erroneous. We will review the legal questions *de novo* and based upon the evidence presented at the suppression hearing and the applicable law, we then make our own constitutional appraisal."

Id. at 569, 774 A.2d at 429 (internal citations omitted).

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures, including seizures that involve only a brief detention.[3] *See United States v. Arvizu*, 534 U.S. 266, ___, 122 S. Ct. 744, 750, 151 L. Ed. 2d 740 (2002); *United States v. Mendenhall*, 446 U.S. 544, 551, 100 S. Ct. 1870, 1875, 64 L. Ed. 2d 497 (1980); *Ferris v. State*, 355 Md. 356, 369, 735 A.2d 491, 497 (1999). Generally, seizures of persons require probable cause to arrest, and investigative detentions violate the Fourth Amendment in the absence of probable cause. *See Florida v. Royer*, 460 U.S. 491, 499, 103 S. Ct. 1319, 1325, 75 L. Ed. 2d 229 (1983). *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), and its progeny created a limited exception to the probable cause requirement for investigative detentions, because the balance

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[3] The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

between the public interest and the individual's right to personal security tilts in favor of a standard less than probable cause in those cases. *See Arvizu,* 534 U.S. at ___, 122 S. Ct. at 750, 151 L. Ed. 2d 740; *United States v. Sokolow,* 490 U.S. 1, 7, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1 (1989). Under *Terry,* certain seizures are justifiable under the Fourth Amendment if there is a reasonable and articulable suspicion that the person is involved in criminal activity. *See Royer,* 460 U.S. at 498, 103 S. Ct. at 1324, 75 L. Ed. 2d 229; *United States v. Cortez,* 449 U.S. 411, 417, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621 (1981); *David S.,* 367 Md. at 532, 789 A.2d at 612; *Quince v. State,* 319 Md. 430, 433, 572 A.2d 1086, 1088 (1990). For Fourth Amendment purposes, a police officer who has reasonable suspicion that a particular person has committed, is committing, or is about to commit a crime may detain that person briefly in order to investigate the circumstances that provoked suspicion. *See Arvizu,* 534 U.S. at ___, 122 S. Ct. at 751, 151 L. Ed. 2d 740; *Berkemer v. McCarty,* 468 U.S. 420, 439, 104 S. Ct. 3138, 3150, 82 L. Ed. 2d 317 (1984).

Reasonable suspicion of criminal activity warrants a temporary seizure for questioning limited to the purpose of the stop. *See Royer,* 460 U.S. at 499, 103 S. Ct. at 1325, 75 L. Ed. 2d 229; *United States v. Brignoni-Ponce,* 422 U.S. 873, 881-82, 95 S. Ct. 2574, 2580, 45 L. Ed. 2d 607 (1975). The determination of whether reasonable suspicion existed is made by looking at the totality of the circumstances in each case to see whether the officer had a particularized and objective basis for suspecting illegal activity. *See Arvizu,* 534 U.S. at ___, 122 S. Ct. at 749, 750, 151 L. Ed. 2d 740; *Cortez,* 449 U.S. at 417-18, 101 S. Ct. at 695, 66 L. Ed. 2d 621; *Graham v. State,* 325 Md. 398, 408, 601 A.2d 131, 136 (1992).

The stop of an automobile and detention of the occupants inside constitute a "seizure" within the meaning of the Fourth Amendment, even though the purpose of the stop is limited and

the resulting detention is brief. *See Whren v. United States*, 517 U.S. 806, 809, 116 S. Ct. 1769, 1772, 135 L. Ed. 2d 89 (1996); *United States v. Sharpe*, 470 U.S. 675, 682, 105 S. Ct. 1568, 1573, 84 L. Ed. 2d 605 (1985); *Wilkes*, 364 Md. at 571, 774 A.2d at 430; *Ferris*, 355 Md. at 369, 735 A.2d at 497. Thus, temporary detentions for traffic violations must not be unreasonable under the circumstances. *See Whren*, 517 U.S. at 810, 116 S. Ct. at 1772, 135 L. Ed. 2d 89. In *Ferris*, we said:

> "[T]he officer's purpose in an ordinary traffic stop is to enforce the laws of the roadway, and ordinarily to investigate the manner of driving with the intent to issue a citation or warning. Once the purpose of that stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention. Thus, once the underlying basis for the initial traffic stop has concluded, a police-driver encounter which implicates the Fourth Amendment is constitutionally permissible only if either (1) the driver consents to the continuing intrusion or (2) the officer has, at a minimum, a reasonable, articulable suspicion that criminal activity is afoot."

355 Md. at 372, 735 A.2d at 499 (internal citations omitted).

In this case, it is undisputed that the initial traffic stop of Nathan and Shaw by the Maryland police for traveling in excess of the posted speed limit was justified. *See Wilkes*, 364 Md. at 572, 774 A.2d at 431. Nathan was speeding on the public highway, and Sgt. Lewis had probable cause to stop the vehicle.

With the above principles in mind, we turn to the first question that we must address —that is, whether the officer's conduct during the traffic stop was sufficiently related to the legal basis for the stop, namely the moving violation. *See Ferris*, 355 Md. at 372, 735 A.2d at 499. It is clear that an

officer conducting a routine traffic stop may request a driver's license, vehicle registration, and insurance papers, run a computer check, and issue a citation or a warning. *See Delaware v. Prouse*, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660 (1979); *Wilkes*, 364 Md. at 578, 774 A.2d at 434.[4]

In order for the continued detention of Nathan and Shaw to be permissible, therefore, there had to exist reasonable, articulable suspicion of criminal activity sufficient to justify the seizure, and the limits of a *Terry* stop must not have been exceeded. *See Royer*, 460 U.S. at 498-99, 103 S. Ct. at 1324-25, 75 L. Ed. 2d 229; *Ferris*, 355 Md. at 384, 735 A.2d at 506. Under *Ferris*, in order to justify a greater intrusion unrelated to the traffic stop, the totality of the circumstances known to the police officer must establish reasonable suspicion or probable cause to support the intrusion. *See United States v. Johnson*, 63 F.3d 242, 247 (3rd Cir. 1995); *Wilkes*, 364 Md. at 574, 774 A.2d at 432; *Ferris*, 355 Md. at 372, 735 A.2d at 499. Absent consent, the officer may only detain the driver and conduct further questioning if, during the traffic stop, the officer acquires an objectively reasonable and articulable suspicion of further illegal activity supported by independent facts sufficient to justify the additional intrusion. *See People v. Redinger*, 906 P.2d 81, 85-86 (Colo. 1995); *Caldwell v. State*, 780 A.2d 1037, 1047 (Del. 2001); *Ferris*, 355 Md. at 372-73, 735 A.2d at 499; *Commonwealth v. Torres*, 674 N.E.2d 638, 642 (Mass. 1997). This involves an objective assessment of the officer's actions in light of the facts and circumstances confronting the officer at the time. *See Sokolow*, 490 U.S. at 8, 109 S. Ct. at 1585, 104

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[4] A police officer may order a driver and occupants out of a lawfully stopped vehicle incident to a traffic stop. *See Maryland v. Wilson*, 519 U.S. 408, 414-15, 117 S. Ct. 882, 886, 137 L. Ed. 2d 41 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 109-11, 98 S. Ct. 330, 332-33, 54 L. Ed. 2d 331 (1977); *Ferris*, 355 Md. 356, 382 n.9, 735 A.2d 491, 505 n.9.

L. Ed. 2d 1; *Terry,* 392 U.S. at 21, 88 S. Ct. at 1880, 20 L. Ed. 2d 889; *Ferris,* 355 Md. at 384, 735 A.2d at 506; *Derricott v. State,* 327 Md. 582, 588, 611 A.2d 592, 595-96 (1992). Fundamentally, in determining whether the search and seizure of Shaw's automobile was reasonable, our initial inquiry is a dual one— whether Sgt. Lewis' action was justified at its inception and whether it was reasonably related in scope to the circumstances that justified the interference in the first place. *See Terry,* 392 U.S. at 19-20, 88 S. Ct. at 1878-79, 20 L. Ed. 2d 889.

Reasonable suspicion is more than a mere hunch but is "a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Illinois v. Wardlow,* 528 U.S. 119, 123, 120 S. Ct. 673, 675-76, 145 L. Ed. 2d 570 (2000). The United States Supreme Court has most recently discussed the concept of reasonable suspicion in *Arvizu.* Noting that the concept is somewhat abstract and elusive, not finely tuned, the Court has deliberately avoided reducing it to a uniform set of legal rules. *See Arvizu,* 534 U.S. at ___, 122 S. Ct. at 751, 151 L. Ed. 2d 740; *Ornelas v. United States,* 517 U.S. 690, 695-96, 116 S. Ct. at 1661, 134 L. Ed. 2d 911 (1996). Nonetheless, we do know that reasonable suspicion is a less demanding standard than probable cause. *See David S.,* 367 Md. at 532, 789 A.2d at 612. The Supreme Court has made clear that otherwise innocent behavior may constitute reasonable suspicion when analyzed as part of the totality of the circumstances. *See Sokolow,* 490 U.S. at 9-10, 109 S. Ct. at 1586-87, 104 L. Ed. 2d 1; *Illinois v. Gates,* 462 U.S. 213, 244 n.13, 103 S. Ct. 2317, 2335 n.13, 76 L. Ed. 2d 527 (1983); *Ferris,* 355 Md. at 386, 735 A.2d at 507. In this regard, the Court stated:

> "When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the

> circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.' Although an officer's reliance on a mere 'hunch' is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard."

Arvizu, 534 U.S. at ___, 122 S. Ct. at 750-51, 151 L. Ed. 2d 740 (internal citations omitted).

Even though each of a series of acts is innocent standing alone, taken together they can constitute reasonable suspicion. *See id.* at ___, 122 S. Ct. at 751, 151 L. Ed. 2d 740; *Sokolow,* 490 U.S. at 9, 109 S. Ct. at 1586, 104 L. Ed. 2d 1. Furthermore, a determination that reasonable suspicion exists need not rule out the possibility of innocent conduct. *See Arvizu,* 534 U.S. at ___, 122 S. Ct. at 753, 151 L. Ed. 2d 740; *Wardlow,* 528 U.S. at 125, 120 S. Ct. at 677, 145 L. Ed. 2d 570.

In *Arvizu,* the Supreme Court also discussed the application of the totality of the circumstances test to otherwise "innocent" conduct, stating:

> "We think that the approach taken by the Court of Appeals here departs sharply from the teachings of these cases. The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the 'totality of the circumstances,' as our cases have understood that phrase. The court appeared to believe that each

> observation by [the border patrol agent] that was by itself readily susceptible to an innocent explanation was entitled to 'no weight.' *Terry*, however, precludes this sort of divide-and-conquer analysis. The officer in *Terry* observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was 'perhaps innocent in itself,' we held that, taken together, they 'warranted further investigation.'"

534 U.S. at ___, 122 S. Ct. at 751, 151 L. Ed. 2d 740 (internal citations omitted). Thus, *Arvizu* makes clear that courts must not view in isolation factors upon which police officers rely to create reasonable suspicion.

The fact that Nathan, the driver, was unable to produce identification, in combination with Sgt. Lewis' observations of Nathan and Shaw's extreme nervousness,[5] Shaw's apparent pretense of sleep when the vehicle was initially stopped, Nathan's evasive answers regarding his travel plans, the inconsistent versions of the trip itinerary and purpose provided by Nathan and Shaw, the "overwhelming" odor of air freshener, and the altered ceiling that led the officer to believe that the van

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[5] In *Ferris v. State*, 355 Md. 356, 735 A.2d 491 (1999), we cautioned against "placing too much reliance upon a suspect's nervousness when analyzing a determination of reasonable suspicion." *Id.* at 389, 735 A.2d at 509. Nonetheless, we also characterized Ferris's nervousness as being "unexceptional." *Id.* We concluded that "Ferris's unexceptional nervousness, in reaction to encountering Trooper Smith, was simply too ordinary to suggest criminal activity." *Id.* In the instant case, however, Nathan and Shaw's nervousness was characterized by Sgt. Lewis as extreme. As indicated *supra*, the fact that conduct may be innocent does not immunize it from consideration in determining reasonable suspicion. Nonetheless, we reiterate that a claim that ordinary nervousness indicates complicity in criminal activity must be treated with caution. *Id.*

had a hidden compartment, as well as the police observations prior to the traffic stop (the passenger's head bobbing up and down in the rear window), were sufficient grounds, taken together, reasonably to warrant an investigative detention. *See Royer,* 460 U.S. at 502, 103 S. Ct. at 1326, 75 L. Ed. 2d 229; *United States v. Kopp,* 45 F.3d 1450, 1453-54 (10th Cir. 1995); *United States v. Springer,* 946 F.2d 1012, 1017 (2nd Cir. 1991); *United States v. Hardy,* 855 F.2d 753, 758 (11th Cir. 1988). Therefore, Sgt. Lewis had reasonable, articulable suspicion to believe that Nathan and Shaw were engaged in criminal activity, and that suspicion was sufficient to support their continued detention.

We turn next to the question of whether the police had grounds to search the van. As we have indicated *supra*, we need not consider whether the police conduct exceeded the scope of Shaw's consent to search because we find that Sgt. Lewis had probable cause to search the vehicle and the hidden compartment. *See supra* note 2 and accompanying text.

Police officers who have probable cause to believe that there is contraband or other evidence of criminal activity inside an automobile that has been stopped on the road may search it without obtaining a warrant. *See Maryland v. Dyson,* 527 U.S. 465, 466-67, 119 S. Ct. 2013, 2014, 144 L. Ed. 2d 442 (1999); *Florida v. Meyers,* 466 U.S. 380, 381, 104 S. Ct. 1852, 1852-53, 80 L. Ed. 2d 381 (1984); *Carroll v. United States,* 267 U.S. 132, 153-54, 45 S. Ct. 280, 285, 69 L. Ed. 543 (1925). If supported by probable cause, every part of a vehicle that may conceal the object of the search may be searched. *See United States v. Ross,* 456 U.S. 798, 825, 102 S. Ct. 2157, 2173, 72 L. Ed. 2d 572 (1982); *United States v. Zucco,* 71 F. 3d 188, 192 (5th Cir. 1995).

The significance of a vehicle alteration or hidden compartment in a vehicle is an issue of first impression for this

Court. Every court that has considered the question has concluded that evidence of a hidden compartment can contribute to a finding of probable cause to search. *See, e.g., United States v. Anderson*, 114 F.3d 1059, 1066 (10th Cir. 1997); *United States v. Inocencio*, 40 F.3d 716, 723-24 (5th Cir. 1994); *United States v. Martel-Martines*, 988 F.2d 855, 858-59 (8th Cir. 1993). We need not decide in this case whether a false ceiling or hidden compartment *alone* would constitute probable cause to believe that drugs or contraband are secreted in a vehicle because, in the case *sub judice*, that factor is only one part of the mosaic.

By the time Sgt. Lewis began his extensive search and dismantling of the van's ceiling, he had probable cause to believe that the van contained contraband and, therefore, he was justified in searching it without a warrant under the well-established "automobile exception" enunciated in *Carroll*. 267 U.S. 132, 153-54, 45 S. Ct. 280, 285, 69 L. Ed. 543 (1925). Considering the totality of the circumstances, we conclude that Sgt. Lewis' observations of the van's ceiling, in combination with Nathan and Shaw's suspicious behavior, were sufficient to constitute probable cause to search the van, including the ceiling. Before Shaw consented to any search, Sgt. Lewis had noticed that the height of the ceiling in the van was lower than normal and that the fabric was new and taut, not as one would normally expect in an eleven-year-old van. The ceiling of the van was solid, hard, with no flexibility, and the map lights would not move, indicating to the officer that there was a false hydraulic compartment containing contraband similar to one that he found in a conversion van four weeks earlier. Sgt. Lewis testified that the console felt like it was affixed with steel plates and that, in a normal van ceiling, the screws would be removable in the center section to allow for the replacement of bulbs and vents dealing with air conditioning and heating.

These factors, taken together, clearly amounted to sufficient probable cause for his search of the van's ceiling.

The facts of the case *sub judice* are strikingly similar to those in *United States v. Anderson*, 114 F.3d 1059 (10th Cir. 1997). In that case, a Kansas Highway Patrol officer stopped Anderson's vehicle because he was following the car in front of him too closely. During the course of the traffic stop, the trooper made the following observations: the driver of the car and his passenger gave slightly conflicting versions of their travel itinerary, the trooper detected the scent of air freshener in the car, the driver was carrying a pager, the car's gas tank had been tampered with, and there appeared to be a hidden compartment in the gas tank. The United States Court of Appeals for the Tenth Circuit concluded that those factors together constituted sufficient probable cause to search the car's gas tank. *Id.* at 1066.

United States v. Inocencio, 40 F.3d 716 (5th Cir. 1994), is likewise instructive. In that case, border patrol agents stopped a pick-up truck exiting a ranch after triggering directional vehicular sensors set up to detect narcotics smugglers attempting to circumvent checkpoints along a major drug smuggling artery. *See id.* at 719-20. When the agents spotted the truck, several factors aroused their suspicions: they were unfamiliar with the vehicle, it had no company logos, tools, or pipe racks typical of oil field trucks, the agents were unaware of any oil activity in the area, and Reyes' (the driver) clothes appeared to be too clean for him to have been working in the oil field. *Id.* at 720. Based on their suspicions, the agents stopped the truck for an immigration inspection. While questioning Reyes, one agent noticed signs of a false compartment in the bed of the truck— the back of the truck was higher than normal, and there was fresh paint and undercoating around and underneath the bed of the truck. Following a search of the truck, the agents recovered approximately 300 pounds of

cocaine from a false compartment in the bed of the truck and, as a result, they arrested Reyes. The Court of Appeals for the Fifth Circuit held that reasonable suspicion for the immigration stop existed. *Id.* at 723. The court also concluded that Reyes' nervousness, conflicting statements explaining his presence on the ranch and his inability to read oil charts and graphs, together with the agents' observations regarding the existence of a false compartment, created sufficient probable cause to search the vehicle. *Id.* at 724.

The United States Court of Appeals for the Eighth Circuit reached a similar conclusion in *United States v. Martel-Martines,* 988 F.2d 855, 858-59 (8th Cir. 1993). In that case, police stopped the truck that Martel-Martines was driving for speeding. *Id.* at 856. During the course of the traffic stop, Martel-Martines consented to allow the police to search the truck. *Id.* at 857. While walking around the rear of the truck, the patrol officer observed a custom-cut plywood board covering the length of the truck bed. When he lifted the board, he saw two lines of caulking in the metal bed. Looking underneath the truck with his flashlight, the trooper could observe that the truck bed recently had been reconstructed to support a concealed compartment. The officer had the truck taken to the police headquarters garage where a small hole was made in the hidden compartment, through which the officers could smell chemicals and observe cellophane wrapping around a brown object. At that point, the police arrested Martel-Martines, and the police ultimately discovered a large quantity of cocaine during thorough searches of the vehicle. Although the court found that Martel-Martines had consented to the search of his truck, the court, assuming *arguendo* that the search exceeded the scope of the consent given, held that, by the time that the officers punched the hole in the truck compartment, they had sufficient probable cause to support a warrantless search of the concealed compartment, based on

Martel-Martines's evasive and inconsistent answers to routine questions and their visual observations of the hidden compartment. *Id.* at 858-59.

For all of the above stated reasons, we find that the search of the vehicle and the seizure of the evidence from within were lawful.

JUDGMENT OF THE COURT OF SPECIAL APPEALS IN NO. 42 AFFIRMED. COSTS TO BE PAID BY PETITIONER NATHAN. JUDGMENT OF THE COURT OF SPECIAL APPEALS IN NO. 61 REVERSED. CASE REMANDED TO THAT COURT WITH INSTRUCTIONS TO CONSIDER REMAINING ISSUES PREVIOUSLY RAISED BUT NOT DECIDED. COSTS IN THIS COURT TO BE PAID BY RESPONDENT SHAW AND COSTS IN THE COURT OF SPECIAL APPEALS TO ABIDE THE RESULT.

Dissenting Opinion by BELL, Chief Judge, in which ELDRIDGE, Judge, joins

I agree with the conclusion reached by a divided Court of Special Appeals in its unreported opinion in *Horace Shaw, Jr. v. State*, filed June 5, 2001, and most of the rationale offered in the very perceptive majority opinion by Judge Kenney. The opinion proceeded on the premise that, subsequent to the traffic stop, there was a second stop, as *Ferris v. State*, 355 Md. 356, 372, 735 A.2d 491, 499 (1999) recognized there could be and it applied *Ferris*, its progeny, *Charity v. State*, 132 Md. App. 598, 753 A. 2d 556, *cert. denied*, 360 Md. 487, 759 A.2d 231 (2000), *Snow v. State*, 84 Md. App. 243, 578 A. 2d 816 (1990) and *Whitehead v. State*, 116 Md. App. 497, 698 A. 2d 1115, *cert. denied*, 348 Md. 207, 703 A.2d 148 (1997), faithfully and forthrightly.

Acknowledging that the traffic stop was valid, based on the speed of the defendants' van, an equipment defect and the officers' observations of the manner in which the van was driven after it was signaled to pull over, the court analyzed whether, and if so, when, a second stop, based on the shifting of the focus from the traffic violation to a criminal, and more specifically, a narcotics, violation, occurred. Notwithstanding that Sgt. Lewis, upon approaching the defendants' van, noticed, as the trial court reported, a "lowered ceiling, conversion ceiling in the roof part of the van that appeared to be new fabric, blue, it wasn't faded at all in this eleven-year-old van" and the ceiling "was extremely tight or erect, there was no sagging in the ceiling," an observation likely to arouse Sgt. Lewis's suspicion, given his recent experience with a conversion van he discovered to have a hidden hydraulic compartment in the ceiling directly above the driver and right front seat passenger, it concluded that when the defendants were ordered out of the van, it was done pursuant to the officer's prerogative under *Pennsylvania v. Mims*, 434 U.S.

106, 111, 98 S. Ct. 330, 333, 54 L. Ed.2d 331, 337 (1977) and *Maryland v. Wilson*, 519 U.S. 408, 411-12, 117 S. Ct. 882, 884-85, 137 L. Ed.2d 41, 46 (1997). Although he might have been operating with a dual motive, the court believed that Sgt. Lewis's questions were proper, "even though they did not appear to have much to do with whether Nathan had committed traffic violations, and that Sgt. Lewis was "ostensibly obtaining information related to the traffic stop" when he obtained Nathan's particulars. During the course of that interview, due to Nathan's obvious nervousness - according to Sgt. Lewis, his carotid pulse was "pounding in his neck, his chest was palpitating, his hands were trembling"- his changing in mid-sentence his answer as to the origin of the trip, the manner in which he answered a question with a question and his refusal to look Sgt. Lewis in the eye, Sgt. Lewis became more suspicious.

It was when the Sergeant left Nathan to question Shaw "for the apparent purpose of catching the men with inconsistent stories" that the focus of the stop shifted, the intermediate appellate court determined. It was during this questioning that Sgt. Lewis's suspicions were further raised as a result of Shaw's behavior and response; Shaw displayed similar nervousness to that displayed by Nathan: Sgt Lewis noticed that Shaw's hands were trembling, there was a nervous twitching just above and behind his right eye and, like Nathan, his carotid pulse was racing in his neck. Noting that the questions put to Shaw was directed not to the traffic offences, but to the origination and, perhaps, the circumstances, the court determined that the focus of the stop had shifted to the narcotics investigation rather than the traffic stop. It, thus, proceeded to consider whether there was either a valid consent or a reasonable, articulable suspicion of criminal activity to support a further detention of the defendants.

Although the court concluded that the defendants consented to the search of the van, it, nevertheless, addressed whether Sgt. Lewis had reasonable suspicion. It listed the historical facts known to Sgt. Lewis:

> "Two African Americans pulled over by two Caucasian, Maryland State troopers are nervous.
>
> "The van contained air fresheners.
>
> "The van, which turned out to be a 1988 model, had some recent work done on the inside such that the ceiling covering seemed new and pulled tight; Sgt. Lewis had found a hydraulic compartment containing a weapon in a conversion van approximately four weeks earlier.
>
> "Both the driver and the passenger had been cooperative and totally compliant with all of his instructions despite initial cause for alarm, including the fact that [Shaw] had been lying down in the back.
>
> "Nathan, who did not own the van and was not related to [Shaw], gave a different story than [Shaw] as to where they were coming from and why they were there.[1]"

It then considered whether any of them or collectively, those factors provided the requisite level of certainty that criminal activity was afoot.

Discounting the air fresheners on the basis of *Charity*, 132 Md. App. at 639, 753 A.2d 578 ("The air fresheners, although they may have created a hunch, did not create an articulable

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[1] The most significant discrepancy, the court determined, was whether the defendants went to New York in the van or in a rental car.

suspicion") and *Snow*,[2] the nervousness of the defendants on the strength of *Ferris*[3] and *Snow*, 84 Md. App. at 260, 578 A. 2d at 824 (nervousness is a "highly subjective observation") and the inconsistent stories with *Whitehead*, 116 Md. App. at 504, 698 A. 2d at 1119 ("There is nothing about not having their stories together, about just whom they visited, or about the day that they left Baltimore, that somehow yields an inference of possession of narcotics. Or, put another way, there is nothing about narcotics laws violators that police can recognize

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[2] In *Snow v. State*, 84 Md. App. 243, 261, 578 A. 2d 816, 824 (1990), the Court of Special Appeals observed, as to air fresheners:

> "Air fresheners are, as far as we know, a completely legitimate object; some are, undoubtedly, thought to be ornamental as well as functional. Nor is the fact that Snow had three air fresheners, as opposed to one, suspicious. The addition of a new freshener without removing the old one is not unusual. As with other cleaning products, when the consumer is uncertain regarding the useful life of a product, the tendency is to keep the old one for a while longer.

[3] We were emphatic in *Ferris v. State*, 355 Md. 356, 388, 735 A.2d 491, 508 (1999):

> "The nervousness, or lack of it, of the driver pulled over by a Maryland State trooper is not sufficient to form the basis of police suspicion that the driver is engaged in the illegal transportation of drugs. There is no earthly way that a police officer can distinguish the nervousness of an ordinary citizen under such circumstances from the nervousness of a criminal who traffics in narcotics. An individual's physiological reaction to a proposed intrusion into his or her privacy cannot establish probable cause or even grounds to suspect. Permitting citizen's nervousness to be the basis for a finding of probable cause would confer upon the police a degree of discretion not grounded in police expertise, and, moreover, would be totally insusceptible to judicial review." (Quoting *Whitehead v. State*, 116 Md. App. 497, 698 A. 2d 1115, cert. denied, 348 Md. 207, 703 A.2d 148 (1997)).

from an inability to agree upon these details of their journey to New Jersey."), the court held:

> "These factors may certainly have given rise to a "hunch" on Sgt. Lewis's part, but we do not believe they add up to articulable suspicion in light of *Ferris* and *Charity*. We note further that, at this point, Sgt. Lewis had not radioed in any information to his dispatch to determine the status of the van or its occupants, and he also saw or smelled nothing other than air freshener that would lead him to believe that the van contained contraband."

Although "[h]e never conducted a thorough search of the interior of the van, did not look under the seats, in the bags [Shaw] and Nathan had in the back of the van, or in the glove box or other containers," and never checked for weapons, despite an earlier profession of concern arising from Shaw's movements in the back of the van, the court observed that Sgt. Lewis entered the van five times in an effort to locate, open and search the hidden compartment he was convinced was there. Based on his earlier experience with a conversion van containing a hydraulic ceiling compartment, the court further pointed out, his focus was on the front part of the van, where the map lights are located. Quoting Sgt. Lewis, it described the first entry: having hit the ceiling twice and checked the two map lights for functionality and finding them to both be working, he tried to pry down that area, where the entrance to the compartment in the earlier van was located, without success; "[a]t that point in time I couldn't budge it, it wouldn't even pull down at all, it wouldn't budge, it was like it was permanently affixed with steel plates or steel rods."

The second entry was with a flashlight, "to further inspect the area." When he still could not gain entry, Sgt. Lewis obtained a screwdriver, which he concealed from the

defendants, for assistance. Even with that assistance, he failed to gain entry to any hidden compartment. The intermediate appellate court concluded, as to these search efforts:

> "We believe that all of these actions were acceptable, although Sgt. Lewis walked on the line of what a reasonable person would find acceptable pursuant to a consent to search when he tried to pry the ceiling compartment open."

(footnote omitted).

After reviewing the testimony of Sgt. Lewis at the suppression hearing, the Court of Special Appeals concluded that he was convinced that there was a hidden compartment once he knocked on the ceiling of the van. To the court, it was significant that, after the third entry and attempt to find and search the compartment, Sgt. Lewis stopped and "advised [Shaw] and Nathan that he was going to get them 'right out of here' and that he was going to radio in that everyone was 'all right,'" and did, in fact, call the dispatcher, but, rather than wait for a response as to whether there were any outstanding warrants, he told the defendants that the van was reported stolen, which he knew to be false. It was also significant that, after handcuffing them, Sgt. Lewis acknowledged that the van had not been reported stolen, advised them for the first time of his belief that the van had a false hydraulically controlled compartment in the ceiling and demanded that they provide him with the location. When neither defendant cooperated, indeed indicated that they did not know about what he was talking, Sgt. Lewis "stated multiple times that he would tear into the ceiling of the van even though he did not want to do so."

Observing that, when he began to pry open the compartment, he was "looking for narcotics more so than other contraband," the Court of Special Appeals opined that, "[t]o the

extent that [Shaw] had previously consented to a search of his van, . . . that consent had expired by this point." Moreover, it rejected the State's argument that the consent continued because neither man instructed Sgt. Lewis to stop or in any way objected:

> "Prior to radioing in to dispatch, Sgt. Lewis had indicated to appellant and Nathan that he would have them on their way shortly, which, no doubt, any reasonable person would interpret as a sign that the search was over. Moreover, to the extent that Sgt. Lewis was asking for consent to rip into the ceiling of the van, such consent was hardly voluntary in view of the fact that he was threatening to do so anyway and both men were in handcuffs."

(Citing *Doering v. State*, 313 Md. 384, 401-02, 545 A. 2d 1281, 1289 (1988).

Turning to the question of whether, at that time, Sgt. Lewis had probable cause to believe that the van contained contraband, the court answered, "no." Its reasoning is clear and logical. Reviewing the definition of probable cause, as explicated in *Dixon v. State,* 133 Md. App. 654, 678, 758 A.2d 1063, 1076 (2000), "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates,* 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983); *see State v. Lee,* 330 Md. 320, 326, 624 A.2d 492 (1993), i.e., a nontechnical conception of a reasonable ground for belief of guilt and recognizing, as *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) teaches, that:

> "The principal components of a determination of probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the

> standpoint of an objectively reasonable police officer, amount to. . .probable cause,"

the court enumerated the historical facts in the case up to the point of the expiration of the consent, with an eye toward determining whether they amounted to probable cause. In addition to those historical facts already identified, they were determined to be:

* * * *

> "The two men were driving a van with out of state license plates down Route 13.
>
> * * * *
>
> "Sgt. Lewis found that the ceiling of the van was hard.
>
> "There was a television mounted into a panel extending perpendicular to the ceiling, a Sony Playstation mounted in that same panel, and a VCR or other component mounted underneath the panel.
>
> "Sgt. Lewis was unable to find any openings or wires suggesting the presence of a hydraulic compartment, nor was he able to pry open the panel containing the map lights, the site of a hydraulic container in [a] van detained previously.
>
> "There were containers in the car, such as bags, but Sgt. Lewis did not look inside them."

Then viewing the facts from the point of view of a reasonable police officer, as it was required to do, *see Ornelas*, 517 U.S. at 700, 116 S. Ct. at 1664, 134 L. Ed.2d at 921, the intermediate appellate court opined:

> "[T]he majority of the factors listed above do not rise to the level of probable cause. For example, air fresheners, only two of which were in the front of the van, are not indicative of criminal behavior, nor is nervousness. Suspicions might be aroused by the

> two men's differing stories as to how they got to New York. but this gives rise to generalized suspicion rather than objective proof of wrongdoing. This leaves us with some generalized suspicion along with a hard ceiling in the van. Sgt. Lewis certainly provided expert testimony regarding the uses of hydraulically controlled compartments in conversion vans, yet we must look at this from the point of view of an objectively reasonable police officer with training and experience in narcotics trafficking."

The court discounted the cases from other jurisdictions involving searches of hidden compartments, noting "[i]n virtually all cases, there was something more than was present in this case." It concluded:

> "An objectively reasonable police officer might have suspected that the van contained a hidden compartment, but, other than the fact that the ceiling was hard, there was nothing else, i.e., wires or an obvious opening, that would indicate the presence of a compartment. We do not believe that, in this case, the generalized suspicion tips the scale into the realm of probable cause. Both men were extremely cooperative and nothing was present to indicate the presence of contraband."

On the basis of this opinion, therefore, I would affirm the judgment in *Shaw* and reverse the judgment in the companion case, *Nathan*, in which another panel of the intermediate appellate court reached the opposite result.

To the majority, sufficient grounds to justify an investigative detention have been established by the following facts, taken together:

> "that Nathan, the driver, was unable to produce identification, in combination with Sgt. Lewis's observations of Nathan and Shaw's extreme nervousness,[4] Shaw's apparent pretense of sleep when the vehicle was initially stopped, Nathan's evasive answers regarding his travel plans, the inconsistent versions of the trip itinerary and purpose provided by Nathan and Shaw, the "overwhelming" odor of air fresheners, and the altered ceiling that led the officer to believe that the van had a hidden compartment, as well as the police observations prior to the traffic stop (the passenger's head bobbing up and down in the rear window),"

___ Md. ___, ___, ___ A. 2d ___, ___ (2002)[slip op. at 16-17], leading to the conclusion that "Sgt. Lewis had reasonable, articulable suspicion to believe that Nathan and Shaw were engaged in criminal activity, and that suspicion was sufficient to support their continued detention." *Id.* at 17, ___ A. 2d at ___. The majority also holds that Sgt. Lewis had probable cause to search the van, reasoning:

> "Considering the totality of the circumstances, we conclude that Sgt. Lewis's observations of the van's

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[4] In *Ferris v. State*, 355 Md. 356, 735 A.2d 491 (1999), we cautioned against "placing too much reliance upon a suspect's nervousness when analyzing a determination of reasonable suspicion." *Id.* at 389, 735 A.2d at 509. Nonetheless, we also characterized Ferris's nervousness as being "unexceptional." *Id.* We concluded that "Ferris's unexceptional nervousness, in reaction to encountering Trooper smith, was simply too ordinary to suggest criminal activity." *Id.* In the instant case, however, Nathan and Shaw's nervousness was characterized by Sgt. Lewis as extreme. As indicated *supra*, the fact that conduct may be innocent does not immunize it from consideration in determining reasonable suspicion. Nonetheless, we reiterate that a claim that ordinary nervousness indicates complicity in criminal activity must be treated with caution. *Id.*

> ceiling, in combination with Nathan and Shaw's suspicious behavior, were sufficient to constitute probable cause to search the van, including the ceiling. Before Shaw consented to any search, Sgt. Lewis had noticed that the height of the ceiling in the van was lower than normal and that the fabric was new and taut, not as one would normally expect in an eleven-year-old van. The ceiling of the van was solid, hard, with no flexibility, and the map lights would not move, indicating to the officer that there was a false hydraulic compartment containing contraband similar to one that he found in a conversion van four weeks earlier. Sgt. Lewis testified that the console felt like it was affixed with steel plates and that, in a normal van ceiling, the screws would be removable in the center section to allow for the replacement of bulbs and vents dealing with air conditioning and heating. These factors, taken together, clearly amounted to sufficient probable cause for his search of the van's ceiling."

Id. at 18-19, ___ A. 2d at ___.

In reaching the latter conclusion, the majority focuses heavily on Sgt. Lewis's observations of the van's ceiling, the conclusions he drew from those observations and his having discovered a false hydraulic compartment in a conversion van similar to Shaw's four weeks earlier. It finds support for that focus in three cases involving hidden compartments, *United States v. Anderson*, 114 F.3d 1059, 1066 (10th Cir. 1997); *United States v. Inocencio*, 40 F.3d 716, 723-24 (5th Cir. 1994); *United States v. Martel-Martines*, 988 F.2d 855, 858-59 (8th Cir. 1993). The "suspicious behavior" to which the majority refers relates back, I surmise, to the "grounds" found sufficient to justify the defendants' continued detention.

I am disturbed by the majority's holding that the facts that the defendants were nervous and gave inconsistent versions of the trip's itinerary and purpose and that air fresheners were present in the van are significant indicia of the existence of probable cause. As we have seen, the appellate courts of this state have previously considered each of these factors and determined that they are slender reeds on which to base reasonable suspicion, not to mention probable cause.

In *Ferris*, this Court, as the majority itself acknowledges, cautioned against "placing too much reliance upon a suspect's nervousness when analyzing a determination of reasonable suspicion." *Id.* at 389, 735 A.2d at 509. It cited a number of cases from other courts to that effect. *United States v. Wood*, 106 F.3d 942, 948 (10th Cir. 1997); *Gonzalez-Rivera v. Immigration & Naturalization Service*, 22 F.3d 1441, 1447 (9th Cir. 1994); *Buffkins v. City of Omaha*, 922 F.2d 465, 470 n. 13 (8th Cir. 1990); *United States v. Andrews*, 600 F.2d 563, 566 (6th Cir. 1979), *cert. denied sub nom. Brooks v. United States*, 444 U.S. 878, 100 S. Ct. 166, 62 L. Ed.2d 108 (1979); *State v. Washington*, 623 So.2d 392, 398-99 (Ala. Crim. App.1993); *State v. Magner*, 191 Ariz. 392, 956 P.2d 519, 524 (Ct. App.1998); *State v. DeMarco*, 263 Kan. 727, 952 P.2d 1276, 1283-84 (1998); *State v. Mendoza*, 748 P.2d 181, 184 (Utah 1987). We pointed out that characterizing an individual as nervous, even unusually so, "is an extremely subjective evaluation." *Ferris*, 355 Md. at 389, *citing United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994). That is especially the case when the officer has had no prior interaction with the person whose behavior is being characterized; under those circumstances, we noted, the officer "could not reasonably gauge [the person's] behavior during the traffic stop with his usual demeanor." *Id.* citing, for that proposition, *United States v. Beck*, 140 F.3d 1129, 1139 (8th Cir. 1998).

To be sure, we characterized the "nervousness" in *Ferris* as being "unexceptional," and, therefore, "simply too ordinary to suggest criminal activity." *Ferris*, 355 Md. at 389, 735 A.2d at 509 On the other hand, citing *Whitehead*, 116 Md. App. at 505, 698 A. 2d at 1119, with approval, we acknowledged:

> "Permitting a citizen's nervousness to be the basis for a finding of probable cause would confer upon the police a degree of discretion not grounded in police expertise, and, moreover, would be totally insusceptible to judicial review."

In the instant case, the majority finds solace in the fact that Nathan and Shaw's nervousness was characterized by Sgt. Lewis as extreme. Unfortunately, it does not provide a basis for differentiating between "ordinary nervousness," which still must be treated with caution and extreme nervousness, which does not and cannot be the basis for probable cause, except by reference to the police officer's characterization. The majority, thus, seems to be ceding the determination of the level of nervousness of a driver to the police, whom it has already decided, because of lack of prior experience and expertise, as well as the unreviewability of any conclusion thereby made, are ill-equipped to do so. Moreover, this analysis undermines the very forceful statement in *Ferris*, providing the road map for getting around its proscription: simply characterize the nervousness as extreme. This is particularly distressing because that is precisely what the characterization will be in each succeeding case, every police officer will become quite aware, and quite adept at discerning palpitations, of the carotid pulse. In *Ferris*, we accepted the admonition of the court in *United States v. Millan-Diaz*, 975 F.2d 720, (10th Cir.1992), against according too much weight to the State's routine claim that garden variety nervousness accurately indicates complicity in criminal activity: "This repetitive assertion by the Government in all cases of this kind must be treated with caution." *United*

States v. Millan-Diaz, 975 F.2d at 722 . 355 Md. at 389, 735 A. 2d at 508-09. No less caution should be shown when the routine claim is of extreme nervousness.

The Court of Special Appeals, in *Whitehead*, addressed the effect on the probable cause calculus of two or more persons giving inconsistent stories with regard to the trip's destination, purpose or origin during a traffic stop. It held that an inability to agree upon these details does not establish probable cause. 116 Md. App. at 504, 698 A.2d at 1119. The same conclusion was reached as to air fresheners in *Charity*; a hunch the presence of such fresheners may provide, but certainly not probable or even reasonable suspicion. In *Charity*, it also must be remembered, there were 72 air fresheners on the rear view mirror. In this case, there were but four, two in the front of the van and two in the rear. It is also interesting that the characterization of this effect, by the same officer, by the way, was the same – overwhelming.

Whether the driver of the van produced a driver's license adds little, if anything to the inquiry. To be sure, Maryland Code (1977, 1998 Repl. Vol.) § 16-112 (c) of the Transportation Article requires every driver to have his or her driver's license with him or her and to display it on demand to any uniformed police officer. Failure to have a license in possession and, thus, to display it, is a misdemeanor punishable only by a fine. *See* Md. Code (1977, 1998 Repl. Vol.) § 27-101 (a) and (b) of the Transportation Article. This is to be contrasted with the requirement that every driver be licensed. *See* Md. Code (1977, 1998 Repl. Vol.) § 16-101 of the Transportation Article. No serious effort was made by Sgt. Lewis to determine which it was, driving without license in possession or driving without a license. Nor does the driver's evasiveness appreciably advance the inquiry. In fact, it would seem to fall squarely within the ambit of the rule with respect to conflicting stories. Shaw's pretense of sleep when Sgt. Lewis

initially approached the van and the observations of the police prior to the traffic stop (the passenger's head bobbing up and down in the rear window) may have had relevance early on, but it was dissipated by subsequent events - both defendants were very cooperative and it was not deemed necessary by Sgt. Lewis to even search the area of the van where Shaw first was seen.

This leaves for consideration only Sgt. Lewis's observations of the van's ceiling. At the outset, I am offended by the suggestion that customization of, or an alteration to, a 1988 conversion van, or any older model vehicle, for that matter, provides a basis for reasonable suspicion to justify a further detention or probable cause to support a search. As far as I know, there is no law against, and indeed no sound basis for discouraging, the owner of such a vehicle from customizing it, repairing it and/or improving it, as an option to purchasing a new one. But the rule that the majority formulates, because it potentially subjects to search all conversion vans so altered and perhaps all vehicles that have been customized and altered from factory specifications, would burden the decision to customize and alter and, thus, discourage its being done.

Nor does the inspection of the van's ceiling justify the conclusion that there was reasonable suspicion for detention or probable cause to search. This is true notwithstanding that Sgt. Lewis had an experience several weeks before which resulted in his discovery in a conversion van of a hydraulically operated compartment. Neither this experience,[5] nor Sgt. Lewis's

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[5] Indubitably, the hidden compartment found in the conversion van several weeks earlier was not a prototype for the hidden compartment in this conversion van, as the location of its entrance was different than the location of the entrance to this one, a fact that Sgt. Lewis discovered after taking claw hammer to ceiling in the area where he located the other compartment and finding nothing.

asserted extensive training and experience in drug interdiction[6] suffices to establish, with the requisite degree of certainty, without empirical data to support it, that this conversion van, or any other, has a hidden compartment and, if so, that those compartments are frequently used to conceal contraband. Certainly, the likelihood that hidden compartments in conversion vans will frequently or almost always be used to conceal contraband is a matter of statistical fact, which is subject to proof. The anecdotal testimony of Sgt. Lewis simply does not suffice as such proof. Indeed, as Nathan reminds us:

> "It cannot fairly be disputed that automobiles are endlessly accessorized and customized in perfectly innocent ways. To say that the fact that a vehicle has had some customized improvement satisfies the requirement that there is a 'fair probability that contraband or evidence of a crime will be found in a particular place,' would . . . place all manner of innocent drivers at risk for unwarranted governmental

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[6] Sgt. Lewis's testimony that other conversion vans had hidden compartments, in his experience, and were used to conceal contraband is not probative. Relevant in this regard is the proffer made at the suppression hearing to the effect that "there is nothing unusual about an older van being converted. It's much cheaper to spend five or six thousand dollars in putting in all this equipment than spending forty or fifty thousand for a new van. And it's done all the time. And one person even said that by safety regulations they have to reinforce the ceiling above the driver when they put in TV's, et cetera, into such vans. And that it would be nothing unusual about this particular van."

Also, As Nathan points out, Sgt. Lewis testified that in fifteen years, he had personally search nine to twelve compartments of the type in this conversion van and in only one of them was any quantity of contraband discovered. In any event, that Sgt. Lewis has seen other hidden compartments in which contraband was concealed is far from dispositive of probable cause. The police regularly find contraband in various parts of vehicles and, yet, those prior discoveries do not provide probable cause to search the next car or another vehicle in the location where the contraband was found.

> intrusion. *See Ferris v. State*, 355 Md. at 386 ('factual circumstances which "describe a very large category of innocent travelers" cannot in of themselves justify a seizure.' (Quoting *Reid v. Georgia*, 448 U.S. 438, 441, 100 S. Ct. 2752, 2754, 65 L. Ed.2d 890, 894 (1980))"

The majority's assertion that *Anderson*, *Inocencio* and *Martel-Martines* support the result in this case is not persuasive. Anderson is similar to the case, *sub judice*, insofar as three of the factors relied upon for probable cause, the smell of air fresheners, conflicting stories about the travel itinerary, the existence of a hidden compartment, are concerned. Two of them, the former two, do not suffice in Maryland to establish either reasonable suspicion or probable cause. As to the hidden compartment, there is a significant difference between coming upon such a compartment inadvertently and surmising that there must be one simply because work has been done on an older vehicle and because the officer recently has come across a vehicle with one. Moreover, there is a significant difference between a hidden compartment in a gas tank and one suspected of being in the ceiling of a van, based only on the fact that the older van was improved.

Inocencio involved a roving Border Patrol stop and, so, is subject to a different analysis, that is guided by the principles enunciated by the United States Supreme Court in *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975). 40 F. 3d at 722. Those principles permit Border Patrol officers on roving patrol to detain vehicles temporarily for investigation when they are "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that the vehicle is involved in illegal activities. *Id.* citing *United States v. Cardona*, 955 F.2d 976, 980 (5th Cir.), *cert. denied*, 506 U.S. 942, 113 S. Ct. 381, 121 L. Ed.2d 291 (1992) (quoting

Brignoni-Ponce, 422 U.S. at 884, 95 S. Ct. at 2581-82, 45 L. Ed.2d at 618) and noting that *United States v. Cortez*, 449 U.S. 411, 421-22, 101 S. Ct. 690, 66 L. Ed.2d 621 (1981) expanded the *Brignoni-Ponce* "reasonable suspicion" test for alien smuggling to encompass vehicle stops for any suspected criminal activity. Factors have been developed to assess whether a Border Patrol agent has acted with reasonable suspicion:

> "(1) known characteristics of a particular area, (2) previous experience of the arresting agents with criminal activity, (3) proximity of the area to the border, (4) usual traffic patterns of that road, (5) information about recent illegal trafficking in aliens or narcotics in the area, (6) the behavior of the vehicle's driver, (7) the appearance of the vehicle, and (8) the number, appearance and behavior of the passengers."

Id., citing *United States v. Castaneda*, 951 F.2d 44, 47 (5th Cir. 1992) (citing *United States v. Melendez-Gonzalez*, 727 F.2d 407, 411 (5th Cir. 1984) (in turn citing *Brignoni-Ponce*, 422 U.S. at 885)). Notwithstanding the absence of the proximity factor, the court in *Reyes* determined that *Brignoni-Ponce* applied, nonetheless, and that "[a] careful examination of the facts creates a reasonable suspicion of illegal activity," including several of the *Brignoni-Ponce* factors, *Inocencio*, 40 F.3d at 723, as follows:

> "The agents testified at trial that Reyes [the driver] appeared nervous and offered conflicting statements in explaining his presence on Helen Ranch Road. In addition, they testified that Reyes was unable to read certain graphs and charts that he claimed he was working on while in the area [and] that the bed of the vehicle was higher than normal, the discovery of fresh paint (on a brand new truck) around the fender wells

> and the fresh undercoating beneath the bed of the truck."

Id. at 723-24. The court concluded that the cumulation of these factors amounted to probable cause. Thus, given the context, there was a good deal more in that case than in this one.

The result in *Martel-Martines* is governed by the consent to search that the defendant gave in that case. The analysis based on a lack of valid consent is pure dicta.

There was a time in America when a person with an older van or car could alter or improve that vehicle, whether to save money or to make it more comfortable or attractive or simply because he or she felt like doing so, by accessorizing and/or customizing it, and drive it on any interstate highway, even one patrolled by police whose major focus is drug interdiction, without fear of the improvement being the cause for suspicion of wrong-doing[7] and, thus, the basis for him or her being subjected to the intrusiveness of a search of that vehicle. After today, I fear that time is no more. Any alteration to an older vehicle that a police officer, experienced in drug interdiction, says may contain a hidden compartment will suffice, so long as he or she also characterizes the occupants, or, I suspect, at least one of them, as extremely nervous and the van has air

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[7] Lest it be forgotten, Sgt. Lewis focused on the newness of the ceiling and its incongruity with the age of the van from the very moment that he approached the van. As reported by the majority opinion:

> "The officer testified that, when Nathan lowered the passenger side window, the odor of air freshener coming from the interior of the vehicle was overwhelming. He testified that he observed a conversion ceiling in the roof of the van that appeared to be lower than normal. The blue fabric around the ceiling of the eleven-year-old van appeared to be new and extremely tight, with no evidence of fading or sagging."

___ Md. at ___, ___ A. 2d at ___ [slip op. at 2].

fresheners, the odor from which, the officer says, is overwhelming and, perhaps, there is not 100 percent identity in the reporting of the itinerary.

Moreover, the record does not demonstrate that Trooper Smith had any. Furthermore, the statement that an individual appeared unusually nervous is an extremely subjective evaluation. *United States v. Fernandez*, 18 F.3d 874, 879 (10th Cir. 1994).

I emphatically dissent.

Judge Eldridge joins in the views expressed herein.

APPENDIX B

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 282

September Term, 2000

HORACE SHAW, JR.

v.

STATE OF MARYLAND

Kenney Butanis, Victor K. (specially assigned),

*Moylan, Charles E. Jr. (Retired, specially assigned), JJ.

Opinion by Kenney, J.
Dissenting opinion by Moylan, J.

Filed: June 5, 2001

Appellant, Horace Shaw, Jr., was convicted by a jury in the Circuit Court for Wicomico County of multiple counts relating to trafficking cocaine and heroin. He raises two issues on appeal:

1. Did the Court err by denying Shaw's Motion to Suppress the Search of the Vehicle?

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* Moylan, J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

2. Was the evidence sufficient to support the conviction of Shaw?

Because we answer "yes" to the first question, we need not address the second.

Statement of Facts

On Wednesday, July 14, 1999, at approximately 8:15pm, appellant was a passenger in his eleven-year-old conversion van, which at the time was being driven by Corinthius Nathan ("Nathan"). The van had been recently refurbished and contained a new television, VCR, and Sony Playstation mounted in the ceiling in the back. The two men (both of whom are African American) were traveling south on U.S. Route 13 near Salisbury. They were pulled over by two Maryland State Police troopers in the same patrol car, Sergeant Mike Lewis ("Sgt. Lewis") and Trooper First Class Robert Penny ("Tfc. Penny"). Sgt. Lewis recorded the stop on a videotape.

Sgt. Lewis' attention was drawn to the vehicle, because as he heard it pass, he believed it to be traveling at a high rate of speed. Sgt. Lewis then "paced" the van driving 70-71 miles per hour in a 60 mile per hour zone. During the "pace," the van drifted 8-10 inches onto the shoulder of the road. Sgt. Lewis activated the lights on his patrol car, and the van moved onto the shoulder. As it did, Sgt. Lewis remarked that one of the taillights was out.

At the time the van pulled over, appellant was in the back. Sgt. Lewis testified that he saw a passenger moving in the back of the van while it was slowing to a stop, and he believed that the van took too long to stop.

During the course of the stop, Sgt. Lewis became suspicious that Nathan and appellant were involved in illegal activity. Specifically, after both visually inspecting and touching the ceiling of the van, he believed it contained a

hydraulically operated compartment. In his experience, such compartments were used for transporting contraband. Sgt. Lewis conducted five separate searches of the van, all focusing on the ceiling. Eventually, after tearing open the ceiling using a crowbar, Sgt. Lewis located a compartment containing a duffel bag. Inside the duffel bag were "4.8 kilograms of cocaine, one hundred ninety-three grams of pure heroin, all wrapped in large gray duck [sic] tape packages. There was also a plastic bag up there with hundreds of money wrappers and a straight edge screwdriver in it." Further facts surrounding the search will be discussed as they become relevant to our discussion.

Appellant and Nathan were arrested and given *Miranda* warnings. Neither was given a traffic citation. Appellant was charged on September 24, 1999, in a ten-count information with: (1) importation of cocaine; (2) conspiracy (to import cocaine); (3) felonious possession of cocaine (carrying a mandatory sentence); (4) felonious possession of cocaine; (5) possession of cocaine; (6) importation of heroin; (7) conspiracy (to import heroin); (8) felonious possession of heroin (carrying a mandatory sentence); (9) felonious possession of heroin; and (10) possession of heroin.

A motions hearing was held on November 5, 1999, at which appellant raised, *inter alia,* a motion to suppress evidence obtained in the search of the van. On March 10, 2000, the trial court denied the motion to suppress.

A trial was held in this case before a jury on March 20, 2000. The jury found appellant guilty of all ten courts, and he was sentenced on March 28, 2000. At sentencing, four of the

ten counts were merged,[1] and appellant was sentenced to a total of twenty-five years, twenty of which were mandatory and carried no possibility of parole.

Discussion

Standard of Review

In reviewing the circuit court's denial of appellant's motion to suppress, we look only at the record of the suppression hearing. In *re Tariq A-R-Y,* 347 Md. 484, 488, 701 A.2d 691 (1997), *cert. denied,* 522 U.S. 1140, 118 S.Ct. 1105, 140 L.Ed.2d 158 (1998). On appeal, the State filed a motion to strike appendix of appellant. Appellant's appendix contained a time line of the events occurring on the videotape as well as a summary of 147 different Maryland State Police Form 130's for Sgt. Lewis. It appears that these documents were submitted to the court after the suppression hearing. Therefore, we will grant the State's motion to strike.

We review the evidence at the suppression hearing in the light most favorable to the prevailing party, in this case the State. We review the circuit court's factual findings only for clear error, but we review the circuit court's legal conclusions *de novo. Id.*, 347 Md. at 488-89.

The Fourth Amendment protects against unreasonable searches and seizures, including seizures of only brief duration, like those of a traffic stop. *Ferris v. State,* 355 Md. 356, 369, 735 A.2d 491 (1999) (citations omitted). Traffic stops do not ordinarily violate the Constitution, because the police generally have probable cause that a violation of the traffic laws has been

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[1] Counts 4 (felonious possession of cocaine) and 5 (possession of cocaine) were merged with Count 3 (felonious possession of 448 grams of more of cocaine). Counts 9 (felonious possession of heroin) and 10 (possession of heroin) were merged with Count 8 (felonious possession of more than 28 grams of heroin).

committed. *Whren v. United States,* 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996). The Supreme Court has nevertheless clearly stated that the detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Ferris,* 355 Md. at 369 (quoting *Florida v. Royer,* 460 U.S. 491, 500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983)). Of course, the purpose of a traffic stop is to give the driver either a warning or a citation for having violated traffic laws.

The Traffic Stop

Appellant argues that the traffic stop itself violated his constitutional rights, because it was based on race and "without any legally justifiable grounds." At the suppression hearing, appellant introduced evidence regarding Sgt. Lewis' possible racial motivations in making the stop. This issue need not detain us, however, because we agree with the circuit court that, in this case, there was nothing to suggest that either Sgt. Lewis or Tfc. Penny were aware of the race of the occupants of the van when the stop was initiated. We adopt the circuit court's findings:

> The credible testimony at the hearing was that Sgt. Lewis was writing notes on the back of a previous ticket when he was distracted by the sound of a motor vehicle go by his location at what he believed was a high rate of speed. When asked by prosecutor if he was able to make any observations regarding the physical characteristics of any occupants of the vehicle, he responded in the negative.

Appellant overlooks the fact that the initial stop of the van was legitimate. The van was paced at 70-71 miles per hour in a 60 mile per hour zone, it had drifted onto the shoulder, and it had a broken taillight. The initial stop in this case was proper.

Was there a "Second" Stop Pursuant to *Ferris v. State?*

Appellant argues that, after Sgt. Lewis approached the van to speak with the driver, Lewis almost immediately began pursuing a narcotics violation rather than a traffic violation.[2] This, he contends, constituted a second stop pursuant to *Ferris,* 355 Md. 356 and *Charity v. State,* 132 Md. App. 598, 753 A.2d 556, *cert. denied,* 360 Md. 487, 759 A.2d 231 (2000). He asserts that, once Sgt. Lewis smelled air fresheners and noticed that the interior ceiling of the van had been lowered and was covered in new fabric, he was hunting for contraband. We believe our analysis begins earlier in the chain of events.

While waiting for the van to pull over, Sgt. Lewis remarked that he believed it was "riding the shoulder" for too long. In addition, he saw the passenger, appellant, rise up in the back of the van and then go back down. We note that traffic stops can be dangerous for police officers, and appellant's actions might certainly provide a reasonable person in Sgt. Lewis' position with cause for concern.

After the van stopped, Sgt. Lewis approached on the passenger side. He asked Nathan for his drivers' license and registration. Nathan had no identification with him, and Sgt. Lewis asked if there were any passengers in the van. Appellant, who was lying down in the back of the van,[3] got up and came to the front of the van. He provided Sgt. Lewis with identification and the vehicle registration. Sgt. Lewis testified that appellant's hands were trembling as he handed over the papers.

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[2] We recognize that Sgt. Lewis' primary job responsibility is drug interdiction, not the enforcement of traffic laws. *Charity v. State,* 132 Md. App. 598, 609-10, 753 A.2d 556 (2000).

[3] Sgt. Lewis described appellant as feigning sleep.

Both Nathan and appellant were cooperative. Despite initial apprehension about the stop, Sgt. Lewis now had two cooperative men providing him with all required information about themselves and the vehicle. Although there was cause for concern, particularly for officer safety, those concerns appeared to have been somewhat dispelled, since Lewis initially did not order either Nathan or appellant out of the vehicle, as he had a right to do under *Pennsylvania v. Mimms,* 434 U.S. 106, 111, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977) and *Maryland v. Wilson,* 519 U.S. 408, 411-12, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997).

Of course, Sgt. Lewis was noticing other things. We quote from the circuit court's opinion:

> Upon approaching the vehicle, Sgt. Lewis testified that he was "overwhelmed with the odor of air freshener emanating from the vehicle's interior." He also testified that he noticed a "lowered ceiling, conversion ceiling in the roof part of the van that appeared to. . .be lower than normal. The fabric that wrapped around this lowered ceiling appeared to be new fabric, blue, it wasn't faded at all in this eleven-year-old van." Sgt. Lewis went on to indicate that the ceiling area appeared to be "extremely tight or erect, there was no sagging in the ceiling."
>
> The Court learned subsequently, that four weeks prior to the stop of Defendants' vehicle, Sgt. Lewis made a stop of another conversion van and discovered a hidden hydraulic compartment in the ceiling directly above the driver and right front seat passenger. Therefore, given the Sergeant's observations of the conversion van, it is not unreasonable to assume that Sgt. Lewis had developed suspicions regarding the ceiling area of the Defendants' van. But is it clear at this point, by any objective standard, that there was no

> valid reason to detain the driver or passenger on the basis of any suspected criminal drug or other contraband activity. What also is clear, however, is that the Sergeant had every right to continue his investigation into violations to the traffic laws, especially with respect to a driver who was without proper identification. [Citations to record omitted.]

Sgt. Lewis had the right to order Nathan out of the car. *Charity*, 132 Md. App. at 619 (citing *Mimms*, 434 U.S. at 111; *Wilson*, 519 U.S. at 411-12). Appellant relies heavily on *Charity* in arguing that, once Sgt. Lewis smelled air freshener and noticed the newly modified ceiling of the van, the purpose of the stop turned into a narcotics investigation such that everything that occurred after that was a second stop under *Ferris* requiring that "either (1) the driver consents to the continuing intrusion or (2) the officer has, at a minimum, a reasonable, articulable suspicion that criminal activity is afoot." *Ferris*, 355 Md. at 372 (citing *United States v. Sandoval*, 29 F.3d 537, 540 (10th Cir. 1994)).

We find that, although Sgt. Lewis may have had a dual purpose in ordering Nathan out of the van, this did not automatically turn the traffic stop into questioning that "had no conceivable relationship to the purpose of the traffic stop." *Charity*, 132 Md. App. at 619. Notwithstanding Nathan and Shaw's polite cooperation after the stop was effectuated, the fact that they were slow to pull over and that Shaw had raised up in the back of the van were enough to cause Sgt. Lewis concern. Thus, we conclude that Sgt. Lewis' prerogative under *Mimms* and *Wilson* to order Nathan out of the car was still intact.

At this point, Sgt. Lewis was still ostensibly obtaining information related to the traffic stop. He took down Nathan's full name, birth date, and social security number. He also asked

Nathan where they were coming from. During this latter part of his questioning, Sgt. Lewis testified that he became more and more suspicious, because of Nathan's nervousness, which he described as follows: Nathan's "carotid pulse I could clearly see pounding in his neck, he chest was palpitating, his hands were trembling. He changed his story in mid-sentence [regarding the origin of their trip]...[When] I would ask him a question, he answered a question with a question, which my experience leads me to believe he's attempting to fabricate something, he's trying to be deceptive in his response." Sgt. Lewis further indicated that Nathan would not look him in the eye. We do not believe Sgt. Lewis' questions were improper even though they did not appear to have much to do with whether Nathan had committed traffic violations.

Sgt. Lewis then left Nathan standing on the side of the road after conducting a brief pat-down search for weapons, and he went to speak with appellant. Sgt. Lewis' actions at this point suggest that the stop was almost solely focused on narcotics rather than the traffic violations. We believe that, if Sgt. Lewis had been as concerned about his safety as the State argues he was, he would have, and should have, conducted a pat search of Nathan immediately after he got out of the van. In addition, he could have ordered Shaw out of the van and searched him as well.

Although Sgt. Lewis had all the information he needed to process the traffic stop – Nathan's personal information, appellant's identification, and the vehicle registration[4] – he

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[4] Although the State contended at oral argument that Sgt. Lewis did not have all of the facts necessary to complete a traffic ticket or warning when he went to speak with appellant because he did not have appellant's identification, Sgt. Lewis testified that "on my initial approach, Mr. Shaw got up from the back and gave me ID, I believe that's the time he gave me ID, gave me a registration card for the vehicle."

went back to ask appellant questions for the apparent purpose of catching the men with inconsistent stories. Appellant's behavior and responses to his questions apparently further raised Sgt. Lewis' suspicions that he had stopped two individuals engaged in criminal activity. Sgt. Lewis noticed that appellant's hands were trembling, he "observed a nervous twitching just above and behind his right eye.... And his carotid pulse was racing in his neck as well." Moreover, appellant provided a somewhat different account of the trip's origin and the reasons for it.

These questions were more focused on where they were coming from than in attempting to ensure that appellant actually owned the van and had a license to drive it. We believe that Sgt. Lewis had, at this point, focused on a narcotics investigation rather than a traffic stop, so we must look to whether "(1) the driver consent[ed] to the continuing intrusion or (2) the officer ha[d], at a minimum, a reasonable, articulable suspicion that criminal activity is afoot." *Ferris,* 355 Md. at 372.

Reasonable Suspicion to Search and Consent

At this point in the encounter, Sgt. Lewis was quite firmly convinced that there was contraband in the vehicle, because he asked appellant if he could conduct a search:

> We have a big problem with guns and drugs up and down this highway. I'm getting ready to get a bite to eat but I was going to check another vehicle real quick. Do you mind if I check the vehicle for guns and drugs real quick and I'll have you guys on your way. We check them all the time.[5]

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[5] This quote comes from the videotape.

Appellant apparently acquiesced to this request, got out of the van, and submitted to a brief pat search. Appellant was allowed to urinate, and then he and Nathan leaned against the guardrail to wait for Sgt. Lewis to finish.

The State argues that Sgt. "Lewis had reasonable suspicion to believe that criminal activity was occurring in the present case." We will engage in a discussion of Sgt. Lewis' "reasonable suspicion," even though we ultimately find that appellant initially consented to the search.

Sgt. Lewis described himself as "overwhelmed" by the odor of air fresheners in the car. Two air fresheners were hung in the front of the car, and two in the back. This Court has previously noted that "air fresheners, although they may have created a hunch, did not create an articulable suspicion." *Charity,* 132 Md. App. at 639. *Charity* also involved a stop by Sgt. Lewis who "was overcome with the odor of air fresheners emanating from the vehicle's interior." *Charity*, 132 Md. App. at 618. Unlike appellant's van, however, the car in *Charity* contained 72 air fresheners. *Id.* at 603. As this Court has stated in the past:

> Air fresheners are, as far as we know, a completely legitimate object; some are, undoubtedly, thought to be ornamental as well as functional. Nor is the fact that Snow had three air fresheners, as opposed to one, suspicious. The addition of a new freshener without removing the old one is not unusual. As with other cleaning products, when the consumer is uncertain regarding the useful life of a product, the tendency is to keep the old one for a while longer.

Snow v. State, 84 Md. App. 243, 261, 578 A.2d 816 (1990). Thus, we believe that the relevance of the air fresheners in this case is far less than in *Charity.*

Both this Court and the Court of Appeals have cautioned against placing too much stock in either nervousness or conflicting stories, even when both of these characteristics are present in a stop. Nervousness has long been recognized as a "highly subjective observation." *Snow*, 84 Md. App. at 260. Of course, many people become nervous when they are confronted by a police officer, even if they are engaging in no wrongdoing other than the traffic violation. *Ferris*, 355 Md. at 388 (citations omitted).

> The nervousness, or lack of it, of the driver pulled over by a Maryland State trooper is not sufficient to form the basis of police suspicion that the driver is engaged in the illegal transportation of drugs. There is no earthly way that a police officer can distinguish the nervousness of an ordinary citizen under such circumstances from the nervousness of a criminal who traffics in narcotics. An individual's physiological reaction to a proposed intrusion into his or her privacy cannot establish probable cause or even grounds to suspect. Permitting [a] citizen's nervousness to be the basis for a finding of probable cause would confer upon the police a degree of discretion not grounded in police expertise, and, moreover, would be totally insusceptible to judicial review.

Ferris, 355 Md. at 388 (quoting *Whitehead v. State*, 116 Md. App. 497, 505, 698 A.2d 1115, *cert. denied*, 348 Md. 207, 703 A.2d 148 (1997) (footnote omitted)).

In *Whitehead*, the suspects were both perceived to be quite nervous, and they told conflicting stories. Judge Sonner, writing for this Court, stated: "There is nothing about not having their stories together, about just whom they visited, or about the day that they left Baltimore, that somehow yields an

inference of possession of narcotics." *Whitehead*, 116 Md. App. at 504.

We recognize that the United States Supreme Court has "recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion." *Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 885, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (discussing evasive driving maneuvers)); *Florida v. Rodriguez*, 469 U.S. 1, 6, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984) (*per curiam*) (discussing obvious attempts to walk away from an airport search or otherwise evade the authorities); and *United States v. Sokolow*, 490 U.S. 1, 8-9, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (discussing the evasive path taken through an airport in an apparent attempt to avoid the authorities). *Wardlow* involved "eight officers in a four car caravan that was converging on an area known for heavy narcotics trafficking," and the defendant fled when he noticed the police. *Wardlow*, 528 U.S. at 124. While it appears as though Nathan and appellant may have been nervous, they did not display the sort of evasive behavior discussed in the Supreme Court cases listed above. They generally were cooperative throughout the stop.

Although we recognize that Sgt. Lewis has tremendous experience and great success in narcotics cases, his articulable suspicion, at this point in the stop, had been triggered by the following:

- Two African Americans pulled over by two Caucasian, Maryland State troopers are nervous.
- The van contained air fresheners.
- The van, which turned out to be a 1988 model, had some recent work done on the

inside such that the ceiling covering seemed new and pulled tight; Sgt. Lewis had found a hydraulic compartment containing a weapon in a conversion van approximately four weeks earlier.

- Both the driver and the passenger had been cooperative and totally compliant with all of his instructions despite initial cause for alarm, including the fact that appellant had been lying down in the back.

- Nathan, who did not own the van and was not related to appellant, gave a different story than appellant as to where they were coming from and why they were there.

These factors may certainly have given rise to a "hunch" on Sgt. Lewis' part, but we do not believe they add up to articulable suspicion in light of *Ferris* and *Charity*. We note further that, at this point, Sgt. Lewis had not radioed in any information to his dispatch to determine the status of the van or its occupants, and he also saw or smelled nothing other than air freshener that would lead him to believe that the van contained contraband.

In any event, we find that, despite his protestations to the contrary, appellant consented to a search of his van. Of course, a search conducted pursuant to a consent is valid despite the lack of a warrant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 2043-44, 36 L.Ed.2d 854 (1973). The Court of Appeals has summarized the law concerning consent searches as follows:

> The burden of proving that the consent was freely and voluntarily given is upon the State. Consent that is coerced by threats or force, or granted only in

> submission to a claim of lawful authority, is not voluntary. Coercion that defeats voluntariness may be by explicit or implicit means, by implied threat or covert force. Although custody is a factor to be considered in determining voluntariness, it is not dispositive, and a person in custody may validly consent to a search.

Doering v. State, 313 Md. 384, 401-02, 545 A.2d 1281 (1988) (citations omitted).

We believe, when appellant acquiesced in response to Sgt. Lewis' request, he did so voluntarily and freely. There was no hesitation on his part, and appellant got out of the van without prompting.

The Initial Search

Sgt. Lewis went into the van five different times. He never conducted a thorough search of the interior of the van, did not look under the seats, in the bags appellant and Nathan had in the back of the van, or in the glove box or other containers. Despite his earlier apprehension stemming from appellant's movements in the back of the van, Sgt. Lewis never checked for weapons.

From the first time Sgt. Lewis entered the van, his focus was on the ceiling in the front part of the van, where the map lights are located, in light of his earlier experience with a conversion van containing a hydraulic ceiling compartment. Sgt. Lewis described his actions as follows:

> I hit [the ceiling] twice with the bottom portion of my hand. I then went to one area dead center of the ceiling, which contained two map lights. I checked to see if the map lights were functional, both were. I then tried to pry down the area where the map lights were. This was the actual entrance to the compartment just

> four weeks earlier that led to the contraband in that compartment. At that point in time I couldn't budge it, it wouldn't even pull down at all, it wouldn't budge, it was like it was permanently affixed with steel plates or steel rods.

Sgt. Lewis then went back to his patrol car and retrieved his flashlight in order to further inspect the area. It still wouldn't budge, so he again retreated to his patrol car to get a screwdriver. He put the screwdriver in his back pocket to conceal it from appellant and Nathan. Even with the help of the screwdriver, the panel still would not come loose. We believe that all of these actions were acceptable, although Sgt. Lewis walked on the line of what a reasonable person would find acceptable pursuant to a consent to search when he tried to pry the ceiling compartment open.[6]

We believe it useful to review Sgt. Lewis' testimony at the suppression hearing about after-market modifications to conversion vans. He stated that the fact that the ceiling was solid and had no "give" at all suggested that it had been reinforced by steel. Sgt. Lewis testified that, since 1995, he had searched approximately nine to twelve hydraulically controlled false compartments in van ceilings. Although he found traces of narcotics in all of these compartments, he found a quantity

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[6] A consent to search a car has been held to apply to containers within the car. *See, e.g., Wilkerson v. State*, 88 Md. App. 173, 189, 594 A.2d 597 (1991) (citing *Florida v. Jimeno*, 500 U.S. 248, 111 S.Ct. 1801, 1804, 114 L.Ed.2d 297 (1991)). The scope of consent in terms of intrusiveness and duration, however, is up to the consenting party. *State v. Jones*, 103 Md. App. 548, 555, 653 A.2d 1040 (1995), *rev'd on other grounds*, 343 Md. 448, 682 A.2d 248 (1996). Evening assuming that the space in the ceiling of the van was a "container," we doubt that a reasonable person who had consented to a search of his or her car would consent to the type of intrusive search that Sgt. Lewis was undertaking when he was trying to pry open interior panels.

of narcotics only in appellant's. He located guns and currency in some cases, and he stated that "many that were empty." In Sgt. Lewis' experience, this type of construction is only used for hydraulic compartments, and these compartments are only used for transporting contraband. Sgt. Lewis believed that no one would have a legitimate reason to have such a reinforced ceiling put into a conversion van.[7] Thus, once he had knocked on the ceiling of the van, he became quite convinced that there was a compartment.

At this point, however, Sgt. Lewis stopped. He advised appellant and Nathan that he was going to get them "right out of here" and that he was going to radio in that everyone was

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[7] We note that, at the suppression hearing, appellant made a proffer regarding testimony by people who do work on conversion vans:

> Your Honor, as I indicated we made great efforts in calling at least half a dozen people as far away as New Jersey, in trying to get someone here to testify that they do conversion vans all the time, that there's nothing unusual about an older van being converted. It's much cheaper to spend five to six thousand dollars in putting in all this equipment than spending forty or fifty thousand for a new van. And it's done all the time. And one person even said that by safety regulations they have to reinforce the ceiling above the driver when they put in TV's, et cetera, into such vans. And that it would be nothing unusual about this particular van....
>
> [T]here is a convention going on now in Las Vegas where the conversion van people that I contacted are presently attending, and therefore, I couldn't get anyone here.

This evidence was never introduced, and appellant never pointed either the circuit court or this court to the safety regulations referenced above. Appellant did file an affidavit with a motion to take additional evidence on defendant's suppression motion, but that motion that was denied. Thus, we are not taking this information into account.

"all right." Sgt. Lewis provided the dispatcher with the vehicle license plate number, and both men's names and dates of birth. Sgt. Lewis also requested backup. He did not wait for the dispatcher to advise whether there were any outstanding warrants for either appellant or Nathan, he did not request a canine unit, and he did not request that someone bring his fiberoptic contraband kit.

Sgt. Lewis testified that, normally, he had equipment with him that would allow him to detect such a compartment without having to pry anything open:

> I have what's known as a contraband kit, it's a thirteen-thousand-dollar kit with a fibrotic [sic] scope, a buster in it, which is a glorified density meter, other types of probes which are very less intrusive. Had I had my fibrotic [sic] scope in the car which I had just taken out of my trunk the week before this stop, I was doing a presentation up in Baltimore City with this particular contraband kit and never put it back in my car. Had I had that I would have utilized the fibrotic [sic] scope in feeding it above the compartment down inside. Once I fed the scope in there a white light comes on, it's a camera, and it views the compartment's interior. I look through a scope and I can actually view the contents of the compartment's interior without having to go into it. But I didn't have that with me.

Rather, Sgt. Lewis handcuffed Nathan and appellant after falsely advising them that the van had been reported as "stolen." Once he had them in handcuffs, he advised them: "I know the vehicle is not stolen but you have a false hydraulically controlled compartment in the ceiling." He demanded several times that they provide him with the location, but they provided no assistance.

The Final Search

After handcuffing appellant and Nathan, Sgt. Lewis repeatedly requested instructions as to how to open the hydraulic compartment.[8] Appellant repeatedly stated that he did not know what Sgt. Lewis was talking about, and Sgt. Lewis stated multiple times that he would tear into the ceiling of the van even though he did not want to do so. At the time Sgt. Lewis began to pry open the compartment, he appeared to be looking for narcotics more so than other contraband, as he advised appellant and Nathan that he would "get the cocaine, heroin or whatever" they had in the van.

To the extent that appellant had previously consented to a search of his van, we believe that consent had expired by this point. The State suggests continuing consent by pointing out that neither man instructed Sgt. Lewis to stop or objected in any way. We are not persuaded. Prior to radioing in to dispatch, Sgt. Lewis had indicated to appellant and Nathan that he would have them on their way shortly, which, no doubt, any reasonable person would interpret as a sign that the search was over. Moreover, to the extent that Sgt. Lewis was asking for consent to rip into the ceiling of the van, such consent was hardly voluntary in view of the fact that he was threatening to do so anyway and both men were in handcuffs. *Doering*, 313 Md. at 401-02.

Thus, the question becomes whether, in light of the foregoing, Sgt. Lewis had probable cause to believe that the van contained contraband such that he could conduct a search. *Brown v. State*, 132 Md. App. 250, 261, 752 A.2d 620 (2000)

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[8] Sgt. Lewis had testified that, with such compartments, there is a certain sequence of events that must take place in order to open the compartment. For example, one compartment might open upon turning the ignition key, hitting the rear defrost button, and then activating the lights, and another might open upon a different sequence of events.

(*citing Maryland v. Dyson*, 527 U.S. 465, 119 S.Ct. 2013, 2014, 144 L.Ed.2d 442 (1999)). In this case, Sgt. Lewis suspected that the van contained a hydraulically controlled compartment, but we must determine whether he had probable cause to believe that, if he accessed the compartment, it would contain contraband. *See Dixon v. State*, 133 Md. App. 654, 677, 758 A.2d 1063 (2000).

> Probable cause is defined as "a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238, 76 L.Ed.2d 527, 103 S.Ct. 2317 (1983); *see State v. Lee*, 330 Md. 320, 326, 624 A.2d 492 (1993); *Braxton v. State*, 123 Md. App. 599, 620, 720 A.2d 27 (1998). It is a nontechnical conception of a reasonable ground for belief of guilt. A finding of probable cause requires less evidence than is necessary to sustain a conviction, but more evidence that would merely arouse suspicion. Our determination of whether probable cause exists requires a nontechnical, common sense evaluation of the totality of the circumstances in a given situation in light of the facts found to be credible by the trial judge. *Probable cause exists where the facts and circumstances taken as a whole would lead a reasonably cautious person to believe that a felony had been or is being committed by the person arrested.*

Dixon, 133 Md. App. at 678-79 (emphasis in original) (citations omitted). "The principal components of a determination of...probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to...probable cause." *Ornelas v. United States*, 517 U.S. 690, 696, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996); *Parker v. State*, 66 Md. App. 1,

9, 502 A.2d 510, *cert. denied*, 306 Md. 70, 507 A.2d 184 (1986). The historical facts in this case are as follows:

- Two African Americans pulled over by two Caucasian Maryland State troopers are nervous.
- The two men were driving a van with out of state license plates down Route 13.
- The van contained air fresheners, two in the front and two in the back.
- The van, which turned out to be a 1988 model, had some recent work done on the inside such that the ceiling covering seemed new and pulled tight; Sgt. Lewis had found a hydraulic compartment containing a weapon in a conversion van approximately four weeks earlier.
- Both the driver and the passenger had been cooperative and totally complaint with all of his instructions despite initial cause for alarm, including the fact that appellant had been lying down in the back.
- Nathan, who did not own the van and was not related to appellant, gave a different story than appellant as to where they were coming from and why they were there, with the most significant discrepancy being whether the two went to New York in the van or in a rental car.
- Sgt. Lewis found that the ceiling of the van was hard.

- There was a television mounted into a panel extending perpendicular to the ceiling, a Sony Playstation mounted in that same panel, and a VCR or other component mounted underneath the panel.
- Sgt. Lewis was unable to find any openings or wires suggesting the presence of a hydraulic compartment, nor was he able to pry open the panel containing the map lights, the site of a hydraulic container in van detained previously.
- There were containers in the car, such as bags, but Sgt. Lewis did not look inside them.

Of course, we need to look at the foregoing facts from the point of view of an objectively reasonable police officer, who "may draw inferences based on his own experience in deciding whether probable cause exists." *Ornelas*, 517 U.S. at 700.

Nevertheless, as we remarked above, the majority of the factors listed above do not rise to the level of probable cause. For example, air fresheners, only two of which were in the front of the van, are not indicative of criminal behavior, nor is nervousness. Suspicions might be aroused by the two men's differing stories as to how they got to New York, but this gives rise to generalized suspicion rather than objective proof of wrongdoing. This leaves us with some generalized suspicion along with a hard ceiling in the van. Sgt. Lewis certainly provided expert testimony regarding the uses of hydraulically controlled compartments in conversion vans, yet we must look at this from the point of view of an objectively reasonable police officer with training and experience in narcotics trafficking.

We have conducted a review of cases in other jurisdictions involving the search of hidden compartments. In virtually all cases, there was something more than was present in this case. In many cases, for example, the secret compartment was far more obvious. *United States v. Arredondo-Hernandez,* 574 F.2d 1312 (5th Cir. 1978) (an obvious structural discrepancy in a pickup truck camper revealed a hidden compartment and appellant himself gave the officer a screwdriver to open it); *United States v. Espinosa,* 782 F.2d 888 (10th Cir. 1986) (a thorough consensual search led the police to observe that the rear quarter panel of the car was loose because of missing and loose screws); *United States v. Price,* 869 F.2d 801 (5th Cir. 1989) (the interior of appellant's vehicle contained an obvious attempt to cover up a secret compartment and the underside of the vehicle an obvious and newly constructed steel compartment that was inconsistent with the vehicle model); *United States v. Strickland,* 902 F.2d 937 (11th Cir. 1990) (during consent search officer noticed a spare tire that seemed too large for the car and that did not fit into its space in the trunk; when the officer removed the tire, it was heavy and something was rolling around inside it); *State v. Jones,* 592 So.2d 363 (Fla. App. 1992) (the gas tank had been obviously altered and it did not appear as though it could even be filled); *State v. Ramirez,* 625 So.2d 119 (Fl. App. 1993) (the door to the hidden compartment was ajar); *United States v. Martel-Martines,* 988 F.2d 855 (8th Cir. 1993) (officer lifted boards resting on a pickup truck bed and saw caulking; further inspection underneath the truck showed a recent, obvious reconstruction of the truck bed); *United States v. Soto,* 988 F.2d 1548 (10th Cir. 1993) (a thorough consensual search led police to observe that the back seat was loose, the hooks holding it in place had been altered, and the area underneath the seat was clean although the car was a 1984 model; further inspection at a gas station revealed alterations in the gas tank); *United States v. Fowler,* 1994 U.S. App. LEXIS 34525 (6th Cir. 1994)

(screws in pickup truck tailgate were loose and the tailgate seemed solid whereas the rest of the truck's construction was hollow); *United States v. Botero-Ospina,* 1995 U.S. App. LEXIS 36677 (10th Cir. 1995) (when officer looked underneath after noting discrepancies with interior floor construction of appellant's van, he discovered a door); *United States v. Toro-Pelaez,* 893 F.Supp. 963 (D. Kan.) (pickup truck obviously contained a subfloor and had other indicia of a poorly concealed hidden compartment); *People v. Blakely,* 278 Ill. App. 3d 704, 663 N.E.2d 760 (1996) (a consent search led officer to notice that the car stereo was loose; moving it led to the discovery of a secret compartment); *United States v. Kincaide,* 145 F.3d 771 (6th Cir. 1998), *reh'g denied, cert. denied,* 525 U.S. 1166, 119 S.Ct. 1085, 143 L.Ed.2d 86 (1999) (there was an obvious structural addition to the underside of appellant's truck, and the discovery of the secret compartment was also conducted as an inventory search); *United States v. Plaskett,* 97 F.Supp.2d 686 (E.D. Va. 2000) (a false floor was clearly visible underneath the vehicle).

In other cases, the presence of objects indicative of drug dealing inside the car provided probable cause to search which led to the location of a secret compartment. *United States v. Olivier-Becerril,* 861 F.2d 424 (5th Cir. 1988) (the spare tire was not in its normal place, and several bags of coffee and a garlic wreath, often used to conceal the scent of narcotics, was in the trunk of the car, and traces of plastic material used in vehicle body repair were also present); *State v. James,* 87 Md. App. 39, 589 A.2d 81 (1991) (the officer smelled marijuana smoke emanating from the vehicle, and a bag was sticking out of the hidden compartment); *State v. Nunez,* 262 N.J. Super. 251, 620 A.2d 251 (1993) (there was an open container of alcohol in the car and two marijuana roaches were in the ashtray; a subsequent search led the officer to an obvious gap under the rear passenger window which led to a hidden

compartment); *United States v. Nicholson*, 17 F.3d 1294 (10th Cir. 1994) (officer smelled marijuana and found methamphetamine on appellant's person); *United States v. Bullock*, 94 F.3d 896 (4th Cir. 1996) *cert. denied*, 519 U.S. 119, 117 S.Ct. 966, 136 L.Ed.2d 851 (1997) (in a case involving Sgt. Lewis, he had observed a large amount of cash, which the driver tried to conceal, in addition to two cellular telephones and a beeper in plain view, and appellant was far more evasive than appellant in this case).

In other cases, police undercover work or police observation led to probable cause to search, which then revealed a hidden compartment. *United States v. Harwood*, 998 F.2d 91 (2nd Cir. 1993) (a traffic stop of a vehicle driven by a suspect who had sold LSD to an undercover officer after advising that the LSD was located in a vehicle he was packing led to the discovery of a poorly concealed hidden compartment); *United States v. Veras*, 51 F.3d 1365 (7th Cir. 1995) (an officer observed appellant loading contraband into a car in the same area where the compartment was located and also found a gun in the car); *United States v. Salazar*, 1997 U.S. App. LEXIS 23183 (6th Cir. 1997) (a drug-sniffing dog alerted to narcotics, which were subsequently discovered in a secret compartment hidden under the spare tire); *State v. Eloy Guzman*, 1999 Tex. App. LEXIS 4120 (Tex. Ct. App. 1999) and *State v. (Blanca Estella) Guzman*, 1999 Tex. App. LEXIS 7963 (Tex. Ct. App. 1999) (drug dog alerted to gas tank, which showed signs of recent alteration); *United States v. Alverez*, 235 F.3d 1086 (8th Cir. 2000) (the officer noticed a usable spare tire when appellant claimed to be having tire problems; on shaking it, there was something rattling around inside, leading to the discovery of contraband).

In still other instances, confidential informants have advised the police about the existence of hidden compartments.

United States v. Padro, 52 F.3d 120 (6th Cir. 1995); *United States v. Lomeli,* 76 F.3d 146 (7th Cir. 1996).

An objectively reasonable police officer might have suspected that the van contained a hidden compartment, but, other than the fact that the ceiling was hard, there was nothing else, i.e., wires or an obvious opening, that would indicate the presence of a compartment. We do not believe that, in this case, the generalized suspicion tips the scale into the realm of probable cause. Both men were extremely cooperative and nothing was present to indicate the presence of contraband.

Appellant and Nathan were caught with a very large amount of narcotics. It is unfortunate that the key evidence in the case must be suppressed. *Mapp v. Ohio,* 367 U.S. 643, 658-59, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Although the evidence must be suppressed, it, at least, will not reach its intended destination, adding to the cost of doing business in the drug trade. Without question, Sgt. Lewis' instincts proved to be correct, but a determination of a constitutional violation cannot be tempered by a "proof's in the pudding" standard. The key is what the officer has probable cause to believe before the search rather than what the search revealed.

Because we are reversing this case due to the violation of appellant's constitutional rights, we need not address whether the evidence was sufficient to convict Shaw.

JUDGMENT REVERSED.

COSTS TO BE PAID BY WICOMICO COUNTY

UNREPORTED

IN THE COURT OF SPECIAL APPEALS OF MARYLAND

No. 282

September Term, 2000

HORACE SHAW, JR.

v.

STATE OF MARYLAND

Kenney Butanis, Victor K. (specially assigned),

*Moylan, Charles E. Jr. (Retired, specially assigned), JJ.

DISSENTING OPINION BY MOYLAN, J.

Filed: June 5, 2001

Respectfully, I dissent. I agree with every step of the analysis in the majority opinion save one (or possibly two, the second being a spin-off of the first).

I agree with the majority that the initial traffic stop, albeit admittedly opportunistic under *Whren v. United States,* 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), was objectively justifiable. I further agree with the majority that in the course of the traffic stop, the appellant consented to a search of the van. In this regard, the majority opinion concluded:

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* Moylan, J., participated in the hearing and conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

> In any event, we find that, despite his protestations to the contrary, appellant consented to a search of his van....
>
> We believe, when appellant acquiesced in response to Sgt. Lewis' request, he did so voluntarily and freely.

I further agree with the majority that the discovery of the existence of a hidden ceiling compartment, as opposed to the subsequent prying open of that ceiling compartment, did not offend the Fourth Amendment. I agree with the majority's conclusion in this regard:

> We believe that all of these actions were acceptable, although Sgt. Lewis walked on the line of what a reasonable person would find acceptable pursuant to a consent search when he tried to pry the ceiling compartment open.

It is at that point in the investigative narrative that my analysis departs from that of the majority. Were I to agree with the next conclusion of the majority, to wit, that there was no probable cause to believe that the hidden compartment contained contraband, I would have no problem agreeing with the rest of the majority's analysis. The subsequent tearing apart of the ceiling of the van clearly exceeded the scope of what the van owner consented to or any reasonable interpretation by the officer of what had been the scope of the consent. Before reaching that point, however, my analysis takes a different turn, rendering the scope of the consent question immaterial.

I believe that on the facts of this case based on the evidence before the suppression hearing judge in this case, the discovery of a hydraulically-controlled and reinforced hidden ceiling compartment in the conversion van *ipso facto* generated probable cause to believe that the van may have contained

contraband so as to justify a warrantless, and perhaps painstakingly thorough, search of it under *Carroll v. United States,* 267 U.S. 132, 45 S. Ct. 280, 69 L.Ed. 543 (1925).

With respect to the existence of probable cause, an appellate court makes its own independent *de novo* appraisal. *Ornelas v. United States,* 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996). It extends deference, however, to the first-level findings of historic fact, if not clearly erroneous. In this case those first-level findings included:

> Upon approaching the vehicle, Sgt. Lewis testified that he was "overwhelmed with the odor of air freshener emanating from the vehicle's interior." He also testified that he noticed a "lowered ceiling, conversion ceiling, in the roof part of the van that appeared to...be lower than normal. The fabric that wrapped around this lowered ceiling appeared to be new fabric, blue, it wasn't faded at all in this eleven-year-old van." Sgt. Lewis went on to indicate that the ceiling area appeared to be "extremely tight or erect, there was no sagging in the ceiling."

In this case, our *de novo* probable cause determination turns on the significance of that hidden ceiling compartment. Although we make a *de novo* determination, we extend deference to the special training and experience of veteran police officers. We are also circumscribed, in my judgment, by the evidence before the suppression hearing judge; we do not range abroad and conduct empirical investigations of our own.

For this panel member, my *de novo* decision as to the significance of such a hidden compartment is, I freely confess, one of first impression and I must take my guidance from the evidence in the case. There was, on the one hand, no evidence

as to a legitimate and innocent purpose for such a compartment.[9]

The evidence, on the other hand, with respect to the sinister purpose of such elaborately constructed compartments came from Sgt. Lewis. Sgt. Lewis knows far more about these things than I and this *de novo* factfinder has no reason not to defer to his experience and expertise. As to the labyrinthine security measures guarding access to such compartments, Sgt. Lewis testified:

> [W]ith such compartments, there is a certain sequence of events that must take place in order to open the compartment. For example, one compartment might open upon turning the ignition key, hitting the rear defrost button, and then activating the lights, and another might open upon a different sequence of events.

Those are security codes worthy of a Brinks truck and the Fourth Amendment does not require me to be naive as to why they are there. Probable cause does not require proof beyond a reasonable doubt. All that is required is a reasonable likelihood that such expensive and elaborately constructed compartments are designed for the express purpose of concealing contraband. The majority opinion well summarizes Sgt. Lewis's experience with such false compartments and his expert opinion as to their significance:

> We believe it would be useful to review Sgt. Lewis' testimony at the suppression hearing about after-market modifications to conversion vans. He stated that the fact that the ceiling was solid and had no "give" at all suggested that it had been reinforced

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[9] There had been, to be sure, a proffer by the appellant but no evidence was ever introduced.

> by steel. Sgt. Lewis testified that, since 1995, he had searched approximately nine to twelve hydraulically controlled false compartments in van ceilings. Although he found traces of narcotics in all of these compartments, he found a quantity of narcotics only in appellant's. He located guns and currency is some cases, and he stated that "many were empty." In Sgt. Lewis' experience, this type of construction is only used for hydraulic compartments, and these compartments are only used for transporting contraband. Sgt. Lewis believed that no one would have any reason to have such a reinforced ceiling put in a conversion van. Thus, once he had knocked on the ceiling of the van, he became quite convinced that there was a compartment.

Some hidden compartments had contained guns and currency; some were empty. Most significantly, however, each and every one of them had contained traces of narcotics. Narcotics had been there in those compartments even if they were no longer there at the precise moment of the search. That, for me, establishes probable cause because it establishes the self-evident purpose of such elaborately coded and steel reinforced hidden ceiling compartments. As the interstate courier theater of the war on drugs begets constantly escalating measures and countermeasures, my *de novo* verdict, at least on the facts of this case, is to put this countermeasure out of business.

Although I suspect that the very nature of this otherwise unexplained "vehicular hidden bank vault" would be enough, without more, to garner my *de novo* verdict that probable cause existed, I am in this case relieved of having to make that decision in a vacuum. Other factors, admittedly of only minimal significance in and of themselves, operate to tilt at

least slightly what might otherwise be a closely balanced decision in the direction of probable cause.

For starters, this expensive and almost bizarrely elaborate refitting of an eleven-year-old van was not something sitting on a showroom floor. It was traveling south on Interstate 13, a known courier route for the southbound narcotics traffic from New York City to the Norfolk area.

When the police first signaled for the van to pull over, the appellant was apparently lying down on the back seat. As he was alerted to the approach of the police, he rose up to look and then went down again. A moment or two later he was feigning sleep, as Sgt. Lewis first walked up to the van. Although of little independent significance, the conduct was sufficiently strange to raise an eyebrow.

Sgt. Lewis testified that as he approached the van, he was "overwhelmed with the odor of air fresheners emanating from the vehicle's interior." There were four air fresheners in the car. Although there are, of course, many non-criminal uses of air fresheners, it is also true that narcotics couriers frequently use air fresheners in an automobile to conceal the tell-tale odor of narcotics. If a probable cause determination were teetering right on the cusp, it would take only the slightest of nudges to move it off dead center.

Because they are observations competent to be received in evidence, I do take note of 1) the appellant's visible nervousness, 2) his avoidance of eye contact, 3) his changing of his story in mid-sentence, and 4) his answering of a question with a question. The appellant and his passenger, when separated for questioning, gave different stories, moreover, about where they were coming from and why they had been there. Inconsistent stories suggest to me that someone was not telling the truth.

All of these "other factors," even in combination, do not come close to establishing probable cause. I am not suggesting that they do. They are, on the other hand, admissible evidence and may provide a slight tilt in cases where only a slight incremental tilt is needed. In this case, they are consistent with and, therefore, fortify my *de novo* determination that probable cause existed for a *Carroll* Doctrine search of the appellant's van.

Given probable cause for a *Carroll* Doctrine search of the van, I find no doctrinal significance in the fact that Sgt. Lewis did not necessarily conduct that search by the least intrusive means. That he could have waited for the arrival of a canine unit or that he could have requested that someone bring his fiberoptic contraband kit to the scene is without significance. All they could have done was to supply, redundantly, the probable cause that I find was already established. Those "kinder gentler" techniques only pertain to the justification for the search, not to the execution of the search. The wall to the hidden compartment still had to be breached. The degree of force required was but a function of the degree of resistance encountered.

APPENDIX C

STATE OF MARYLAND	)	IN THE CIRCUIT
	)	COURT FOR
	)	WICOMICO COUNTY
v.	)	STATE OF
	)	MARYLAND
	)	
HORACE SHAW, JR.	)	CRIMINAL CASE NO.
_____	)	K990892
	)	
	)	IN THE CIRCUIT
STATE OF MARYLAND	)	COURT FOR
	)	WICOMICO COUNTY
v.	)	STATE OF
	)	MARYLAND
CORINTHIOUS JAMES	)	
NATHAN	)	CRIMINAL CASE NO.
_____	)	K990893

OPINION AND ORDER OF COURT

This matter is before the Circuit Court for Wicomico County, Maryland by way of motions to suppress filed in the above captioned cases. The Defendants, Horace Shaw, Jr. ("Shaw") and Corinthious J. Nathan ("Nathan") are charged with numerous violations of the criminal law arising out of a traffic stop on July 14, 1999 in Wicomico County, Maryland, in which approximately five kilograms of cocaine and 200 grams of heroin were seized. The Defendants' moved for, and were granted, separate trials on the merits, but consented to a joint hearing on motions on November 5, 1999. After a day long hearing, counsel for the Defendants requested, after obtaining and reviewing the transcript of the day's proceedings, an opportunity to submit memoranda. The Court held the matter *sub curia,* pending the submission of all memoranda.

Defendant Shaw, represented at the hearing by Paul R. Kramer, Esquire, and Defendant Nathan, represented by Harold I. Glaser, Esquire, argued that the physical evidence found at the scene of the stop should be suppressed for reason that it was illegally seized. In addition, Nathan argued that his statement made shortly after his arrest was illegally obtained and should be suppressed.[1] The Defendants allege that the motions to suppress the physical evidence rest on the following grounds:

1. The stop and continued detention of the Defendants was motivated by the Defendants' race in violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

2. The search of the Defendants' vehicle[2] and the recovery of the narcotics was the result of an unreasonably long detention in violation of the Fourth Amendment of the United States Constitution and applicable Maryland case law.

3. The search of the Defendants' vehicle and the discovery of the narcotics was unsupported by probable cause in violation of the Fourth Amendment of the United States Constitution and applicable Maryland case law.

4. Defendant Shaw's consent to search his vehicle was not voluntary and thus constituted an unreasonable search and seizure in violation of the Fourth

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[1] A number of other motions were filed by both Defendants. At the time of the hearing, those motions were either found to be moot or to have no application to the proceedings.

[2] Although reference throughout is to **Defendants'** vehicle, only Defendant Shaw was the owner. Defendant Nathan was the driver at the time of the traffic stop.

Amendment of the United States Constitution and applicable Maryland case law.

5. Any consent to search Defendant's vehicle was beyond the scope of consent and was unreasonably invasive in violation of the Fourteenth Amendment to the United States Constitution and applicable Maryland case law.

6. That the consent to search Defendant's vehicle was without probable cause pursuant to the provisions of the Fourth Amendment of the United States Constitution, Article 26 of the Maryland Declaration of Rights and applicable Maryland case law.

Nathan further alleges that his statement at State Police Headquarters following his arrest "should not be considered because it was obtained by coercion, promises and not proper process under the rulings regarding 'Miranda' warnings."

As the issues raised by the Defendants are intertwined, the Court will combine the specific issues and address them as "The Stop," "The Search and Detention," and "The Statement."

Facts

Given the fact that the stop of the Defendants' vehicle was recorded on audio and video tape, the facts surrounding the stop are largely undisputed, including the specific times at which certain events during the stop occurred.[3]

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[3] Any differences in the specific times are largely insignificant, although the total time from stop to arrest is a factor that the Court has considered.

On July 14, 1999, at approximately 8:15 p.m., Shaw was a passenger in a 1988 Dodge conversion van[4] driven by Nathan traveling southbound on U.S. Route 13 near Salisbury, Maryland. Maryland State Police Sgt. Mike Lewis and Tfc. Robert Penny was seated in Sgt. Lewis' unmarked police cruiser in the parking lot of Zia's (a restaurant), just north of Centre Road, across from The Centre at Salisbury. Sgt. Lewis was writing notes on the back of a previously issued ticket. Tfc. Penny had entered Sgt. Lewis' car for the purpose of using Lewis' cellular telephone.

While seated in his parked car, Sgt. Lewis heard what he described as the sound of a vehicle go by his location at an apparent high rate of speed. Sgt. Lewis and Tfc. Penny pursued the vehicle onto the U.S. Route 13 bypass pacing the van at 70-71 miles per hour in a marked 60 miles per hour speed zone. Sgt. Lewis testified that he observed the vehicle drift across the shoulder of the roadway on two occasions and that he noted the left brake lamp was out on the van.

Activating his emergency equipment, Sgt. Lewis stopped the van. In the process of effecting the stop, Sgt. Lewis noted that there was a passenger in the rear portion of the vehicle who raised and then lowered his head. There is no indication in the testimony that either of the officers was able to make any observations regarding the physical characteristics of the occupants including their race or gender until such time as the van was stopped. Indeed, until the van was stopped, there is no indication that either of the officers knew how many occupants there were in the vehicle.

Sgt. Lewis approached the vehicle on the passenger side and asked the driver, later identified as Defendant Nathan, for

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[4] The conversion van is erroneously described as a 1998 Dodge Ram Van in footnote 2 on page two of Defendants' memoranda.

his license and registration. The officer testified that he was overwhelmed with the odor of air freshener coming from the interior of the vehicle when Nathan lowered the passenger side window. He further testified that he observed a conversion ceiling in the roof part of the van that appeared to be lower than normal. The fabric around the ceiling appeared to be new with no evidence of fading. Sgt. Lewis further indicated that the fabric appeared to be extremely tight or erect with no sagging in the ceiling.

The passenger in the back of the van was later identified as Defendant Shaw. He was observed by Sgt. Lewis lying beneath a couple of light travel bags and a blanket. He was asked to move to the front of the van; Sgt. Lewis indicated that he acted like he had been asleep. Shaw provided Sgt. Lewis with the vehicle registration and some additional paperwork. Thereafter, Nathan was asked to exit and move to the rear of the vehicle. Sgt. Lewis testified that he noticed that Nathan's carotid pulse was pounding on both sides of his neck, that his chest was palpitating, and that his hands were trembling. Sgt. Lewis indicated that Nathan would not look him in the eyes. He said that Nathan could not produce a driver's license or any other form of identification.

Upon questioning Nathan as to the origin of the trip, Sgt. Lewis said that Nathan indicated that he was coming from New York, then said that he actually had been coming from New Jersey. Nathan indicated that he and Shaw had been to New Jersey to pick up the van, then said that they were taking it back after 500 miles to get the engine oil checked. Concerned with the lack of identification on Nathan, with the physical characteristics that he observed and that Nathan had changed his story in mid-sentence, Sgt. Lewis testified that he decided to question Shaw.

Sgt. Lewis testified that he asked questions of Shaw concerning the origin of the trip. His response was that they were coming from New York; that they had driven to New York in a rental vehicle to pick up the van and that they had just picked it up. Sgt. Lewis testified that he noticed Shaw's hands trembling while he was talking to him, that his carotid artery was pounding and that he observed a nervous twitch over his eye. Shaw was asked if he would consent to a search of the vehicle to check for guns and drugs. Shaw agreed and stepped from the van. He consented to a pat down for weapons.

Sgt. Lewis entered the van on the driver's side. He hit the ceiling area over the driver's seat with his hand and noted that the ceiling was very solid and very hard with no flexibility. He observed that the ceiling area was consistent with the ceiling area of a van he had stopped about four weeks earlier in which he found an after-market-installed compartment with hydraulic pistons. He attempted to shift the console area and found that he was unable to pull it down. He testified that he believed that it was permanently affixed with steel plates or steel rods.

Sgt. Lewis testified that he exited the van to retrieve a flashlight to use in an attempt to look into the ceiling area. Upon returning he was still unable to move the console area. He exited the van again and returned with a screwdriver to use in an attempt to pry open the console area. Unable to budge any part of the console area, Sgt. Lewis returned to his vehicle and called for backup and requested information on the vehicle and its occupants.

Upon exiting his vehicle he indicated to the Defendants that the tags on the vehicle indicated that it was stolen. He had the Defendants handcuffed and placed them in investigative detention. The Sergeant admitted that he had no information that the vehicle was stolen and that his only purpose in securing the Defendants was to prevent a physical confrontation. When

the handcuffs were placed on the Defendants, Sgt. Lewis advised them that he knew that there was a secret compartment in the van and asked them what the code was to open the compartment.[5] He advised the Defendants that if the code was not revealed that he would have to rip open the ceiling area. Upon receiving no response from the Defendants, Sgt. Lewis proceed to tear open the ceiling area and subsequently found a secret compartment containing 4.8 kilograms of cocaine and 198 grams of pure heroin wrapped in gray duct tape packages. Also found were several hundred money wrappers.

At approximately 8:34 p.m., about 19 minutes after the stop of the vehicle, both Defendants were placed under arrest and transported to the Maryland State Police Barracks in Salisbury, Maryland. Shaw made no custodial statements, however, Nathan made a statement to Special Agent ("S/A") David Rivello of the United State's Department of Justice, Drug Enforcement Administration. The statement was made approximately two hours after Nathan had been *Mirandized*[6] on the side of the road by Sgt. Lewis. Nathan was also advised of his rights under *Miranda* by S/A Rivello.

Analysis

The Stop

1.

Defendants argue that the initial stop by Sgt. Lewis was based on racially selective enforcement in violation of the

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[5] Sgt. Lewis testified that often times there is a complicated sequence of electronic events that has to occur in order to open a secret compartment. Sgt. Lewis explained, "[y]ou [have] to put the vehicle in drive one, put your foot on the brake, activate the rear defrost button, hit the cruise control and a steel door would slide open." Tr. at 179.

[6] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Equal Protection Clause of the United States Constitution. They suggest that there were no legally justifiable grounds for the stop and that traffic stops of the Maryland State Police generally, and Sgt. Lewis particularly, are motivated by discriminatory purposes. In support of their argument, they cite statistics that show that 54% of Sgt. Lewis' stops between January, 1995 and September, 1999 involved minorities. They allege that it is inconceivable that 54% of all traffic violators on Route 13 in Maryland are minorities.

In further support of their argument, Defendants point to, *inter alia,* statements made by Sgt. Lewis in an interview with *The New York Times Magazine* (Defendants's Exhibit 13), and to racially discriminatory statements allegedly made to Sgt. James C. Collins of the Maryland State Police, the reporting of which is the subject of a pending lawsuit in the United States District Court.[7]

A great deal of the questioning by counsel for Defendant Shaw at the hearing on motions centered around allegations of racial discrimination and motivation by Sgt. Lewis. In his argument to the Court, Shaw suggests that the stop was without "any legally justifiable grounds." (Defendant Shaw's Memorandum at 5). What Shaw ignores is the fact that the vehicle in which he was a passenger was operating in excess of the posted speed limit and ran off onto the shoulder of the road

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[7] By stipulation, the State and Defendants agreed that Sgt. Collins, who is white, would testify that Sgt. Lewis told him that there was "nothing prettier than niggers in handcuffs." Sgt. Lewis denies making the statement. *See Collins v. Md. State Police, et al.,* 98-CV-1534 (Md. District).

on more than one occasion.[8] Upon following the van, it was also observed that the vehicle's left brake lamp was not functioning. Sgt. Lewis has been a state trooper for over fifteen years and by his estimation has made thousands of traffic stops. Tr. at 153. It does not strain the bounds of credulity to accept that he could make some judgment of a motor vehicle's speed by its sound and movement. Clearly, those factors alone may not be enough to sustain a conviction for exceeding the posted speed limit or even to justify a stop of the vehicle, but the Sergeant's observations surely constitute sufficient reason for further investigation. Further investigation revealed that, in fact, the vehicle was operating ten or more miles per hour above the speed limit and failed to stay within a single lane of travel.

Moreover, there is nothing to suggest that Sgt. Lewis (or Tfc. Penny) knew the race of the occupants of the motor vehicle prior to the stop. The credible testimony at the hearing was that Sgt. Lewis was writing notes on the back of a previous ticket when he was distracted by the sound of a motor vehicle go by his location at what he believed was a high rate of speed. When asked by the prosecutor if he was able to make any observations regarding the physical characteristics of any occupants of the vehicle, he responded in the negative. Tr. at 142.

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[8] Shaw argues that pacing a motor vehicle is unreliable and that "[i]t is a stretch of reason to believe that Sgt. Lewis took notice of a full size van crossing the white line less than a foot, or that it amounted to a valid reason to make a traffic stop." To the contrary, it is a "stretch" to suggest that speeding and failing to stay within a single lane are violations of the traffic laws of Maryland that should be ignored when observed by a trained police officer with fifteen years of experience. "The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Terry v. Ohio* 392 U.S. 1 (1968).

Courts should carefully review traffic stops which result in searches and seizures when there is evidence that the stop may have been effected for reasons other than reasonable suspicion or probable cause. Race, ethnicity and drug courier profiles may give rise to questions concerning motivation. In *Derricott v. State,* the Court of Appeals noted that "a profile alone may 'describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures' if a mere match to such a profile were deemed sufficient suspicion to justify a search or seizure." *Derricott v. State,* 327 Md. 582, 589, 611 A.2d 592 (1992). In this case, however, the arguments that suggest racial discrimination are not persuasive. Sgt. Lewis' enthusiasm and his comments taken out of context may cause concerns in some quarters, nonetheless, there is nothing to suggest that the stop of the van was motivated by anything more than a state trooper investigating what he reasonably believed were violations of the traffic laws of the State of Maryland. If police officers must monitor the percentage of their stops as they relate to race, ethnicity or even gender and use those percentages in order to determine whether to make a stop of a motor vehicle or to detain or arrest a criminal defendant, all manner of lawbreakers may escape the scrutiny and application of the law.

Accordingly, this Court finds no evidence that the police officers generally, and Sgt. Lewis particularly, acted improperly in the stop of the Defendants' vehicle. Any attempt to suggest that the stop of the vehicle was racially motivated is lacking in legal or factual basis and misplaced in this case.

2.

For the same or similar reasons previously advanced by the Defendants, they suggest that their continued detention was based on their race and the bias that Sgt. Lewis had against black motorists. The short answer to the Defendants'

allegations is that there simply is no evidence to substantiate their contentions. The Court finds their bald allegations to be without merit.

The Search and Detention

Once the determination had been made that there may have been violations of the traffic laws of the State of Maryland justifying the stop of the Defendants' vehicle, Sgt. Lewis' questioning of the driver of the vehicle, and subsequently, of the passenger, amounted to little more than a non-constitutional accosting. Judge Davis, writing for the Court of Special Appeals in *Reynolds v. State,* in describing a typical accosting wrote: "an accosting occurs when police officers approach a citizen and ask for information, usually one's name, address, date of birth, destination, point of origin, and contents of luggage or vehicle." *Reynolds v. State,* 129 Md. App. 410, 428, 742 A.2d 55 (1999). Judge Davis explained further that "[v]irtually all such interviews conducted during the course of an officer's duties are done for the purpose of gathering information to ferret out criminal offenses or to elicit from witnesses facts relative to a criminal event or an ongoing investigation." *Reynolds* at 428. An accosting or questioning is not a seizure, therefore, reasonable articulable suspicion may not be necessary. Sgt. Lewis believing that there had been a violation of the traffic laws of the state of Maryland, as a part of his investigation into those violations, approached the vehicle and requested of the driver that which any reasonable officer would request. Nathan was asked to produce his license and the vehicle registration. He had no identification on his person or in the vehicle.

Upon approaching the vehicle, Sgt. Lewis testified that he was "overwhelmed with the odor of air freshener emanating from the vehicle's interior." Tr. at 144. He also testified that he noticed "a lowered ceiling, conversion ceiling in the roof part

of the van that appeared to...be lower than normal. The fabric that wrapped around this lowered ceiling appeared to be new fabric, blue, it wasn't faded at all in this eleven-year-old van." Tr. at 143. Sgt. Lewis went on to indicate that the ceiling area appeared to be "extremely tight or erect, there was no sagging in the ceiling." Tr. at 143.

The Court learned subsequently, that four weeks prior to the stop of Defendants' vehicle, Sgt. Lewis made a stop of a another conversion van and discovered a hidden hydraulic compartment[9] in the ceiling directly above the driver and right front seat passenger. Therefore, given the Sergeant's observations of the conversion van, it is not unreasonable to assume that Sgt. Lewis had developed suspicions regarding the ceiling area of the Defendants' van. But it is clear at this point, by any objective standard, that there was no valid reason to detain the driver or passenger on the basis of any suspected criminal drug or other contraband activity. What also is clear, however, is that the Sergeant had every right to continue his investigation into violations of the traffic laws, especially with respect to a driver who was without proper identification.

Sgt. Lewis asked Nathan to exit the vehicle and questioned him about his date of birth and the trip's point of origin. In the course of the questioning, Sgt. Lewis testified that Nathan "changed his story in mid-sentence." Tr. at 149. Sgt. Lewis testified that he was able to make certain observations about Nathan including the fact that his hands were trembling, that he appeared tense, that he avoided eye contact, that his carotid pulse was pounding on both sides of his neck and that his chest

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[9] Sgt. Lewis testified that he was the "agency [Maryland State Police] instructor for hydraulic and electronically controlled compartments" and that he had received between 100 to 150 hours of training dealing specifically with those compartments. He was qualified by the Court as an expert in hydraulically and electronically controlled equipment.

was palpating.[10] It was at this time that Sgt. Lewis decided to speak to Shaw. When asked his reasons for doing so by the prosecutor, Sgt. Lewis responded, "Mr. Nathan had absolutely no ID on him at all, he just gave me a name and date of birth." Tr. at 149. Sgt. Lewis went on the say, "I wanted to verify who my driver was if, in fact, I had a licensed driver or a wanted individual." Tr. at 150. Although it is apparent that Sgt. Lewis' suspicions were becoming aroused as to possible criminal activity by one or more of the persons in the van (Tr. at 150), he was still in the process of gathering information directly related to the traffic violations for which he had originally stopped the vehicle.

Sgt. Lewis' conversations with Shaw produced a version of events leading up to the traffic stop different from that

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[10] During Sgt. Lewis' direct and cross examination there was considerable reference by Sgt. Lewis to the observation of certain of the physical characteristics of both Defendants that tended to indicate their involvement in criminal activity as opposed to merely being involved in violations of the traffic laws. Counsel for Shaw had produced for the Court, detailed records known as DSP 130 forms reflecting the reasons for Sgt. Lewis' traffic stops from 1995 through 1999. Counsel suggested at the hearing that in most instances where nervousness was cited as a factor in determining grounds for conducting a search, no contraband, especially drugs or weapons were found. A review of the Form 130's indicates that in many of Sgt. Lewis' searches, nervousness without reference to more detailed physical observations was cited as one of the grounds for a search or request to search. However, contrary to Defendants' assertions, in most of the instances where detailed descriptions of physical characteristics were noted, e.g. heart palpitations, and pounding of the carotid artery, contraband was found. This Court recognizes that nervousness alone is not sufficient to form a basis for police suspicion that the driver or passenger of a motor vehicle is engaged in the illegal transportation of drugs or weapons. *Whitehead v. State*, 116 Md. App. 497, 698 A.2d 1115 (1997). Nonetheless, nervousness and specific observations of physical characteristics tending to evidence nervousness when viewed by the experienced eye of a police officer take on a special meaning which a reasonable officer may consider in forming reasonable articulable suspicion and/or probable cause.

related to the Sergeant by Nathan. Sgt. Lewis also noted that Shaw's hands were trembling, his carotid artery was racing in his neck and he had a nervous twitching just above and behind his right eye. Sgt. Lewis testified that as a result of his fifteen years experience with the Maryland State Police that the physical observations that he noted were indicative of criminal activity. "In *Derricott,* 327 Md. at 591, 611 A.2d at 597, the Court of Appeals recognized that a police officer, 'by reason of training and experience, may be able to explain the special significance of...observed facts.' Thus, conduct that appears innocuous to the average layperson may in fact be suspicious when observed by a trained law enforcement official." *Ferris v. State,* 355 Md. 356, 391-92, 735 A.2d 491 (1999). See Footnote 10. Sgt. Lewis asked and received consent from Shaw to search his van. Up to and including the request to search the vehicle, Sgt. Lewis' actions were not unreasonable under the circumstances. Indeed, it appears that only a little more than four and one-half minutes had elapsed from the beginning of the traffic stop to the time in which consent to search was given. While an argument may be made that Sgt. Lewis believed that he was involved in an interdiction stop, his questioning of both Defendants was directly related to his search for information relative to the traffic stop of the 1988 van. If, in the course of an investigation, evidence of other illegal activity begins to unfold and become apparent to a police officer, that officer should not be precluded from using that information to determine if it is constitutionally permissible to move his investigation to another level.

2.

Defendants argue that Shaw's consent to search his vehicle was not voluntarily given. They suggest that evidence of involuntariness of consent is the fact that the consent was preceded by an illegal racially motivated traffic stop and a second detention unsupported by any articulable suspicion. For

the reasons previously stated in this Opinion, this Court is not persuaded that the initial stop of the motor vehicle was motivated by anything other than an intention to enforce the traffic laws of this state. Likewise, the Court has determined that up to the point that consent to search was given, that the officer was involved in his investigation of violations of the traffic laws.

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) points out that it is constitutionally permissible to conduct a search without a warrant, as long as there is valid consent. In *Schneckloth,* the United States Supreme Court held that the question of whether consent to search is voluntary is a question of fact to be determined by the totality of the circumstances. Shaw's consent, given a short time after the traffic stop, was given while he was seated in his van. He had not been made, at this point in the stop, to exit his vehicle and was not in the immediate presence of more than one police officer. A review of the video reflecting the stop, although absent significant audio, does not indicate that Shaw was forced, threatened or in any other way intimidated into giving consent to search. The Court believes, considering the totality of the circumstances, that the consent to search the 1988 van was freely and voluntarily given by Defendant Shaw, the owner of the van.

3.

Once consent to search had been given to Sgt. Lewis, Shaw was asked to exit the vehicle in order that the search could be performed. Although the purpose of the traffic stop had not yet been completed, it is clear that Sgt. Lewis' attention was now focused on matters other than Nathan's speeding and failing to drive a motor vehicle within a single lane. Shaw contends that he was detained shortly after he exited the vehicle and was told to "sit tight" by Sgt. Lewis. He suggests that Sgt. Lewis did not

have "independent, reasonable articulable suspicion" that Shaw (and presumably Nathan) was engaged in criminal activity.

Assuming for arguments sake that Sgt. Lewis had concluded or abandoned the original purpose of the traffic stop, a police-driver, and in appropriate cases, police-passenger, encounter which implicates the Fourth Amendment is constitutionally permissible only if either (1) the driver consents to the continuing intrusion or (2) the officer has, at a minimum, a reasonable, articulable suspicion that criminal activity is afoot. *United States v. Sandoval,* 29 F.3d 537, 540 (10th Cir. 1994). In *Alabama v. White,* the United States Supreme Court noted that establishing reasonable suspicion is a significantly less onerous burden than required to establish probable cause:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Alabama v. White, 496 U.S. 325, 330 (1990).

When Shaw gave permission to search his vehicle he consented to a continuing intrusion on his person and property. At some point during that intrusion, a point difficult to determine, it can be argued that the Sergeant's actions exceeded Shaw's consent amounting to a second or subsequent detention. By this time, however, Sgt. Lewis' level of suspicion had ripened into reasonable suspicion or reasonable articulable suspicion. In fact, this Court is persuaded that considering the totality of the circumstances, Sgt. Lewis had reasonable

articulable suspicion to investigate possible criminal activity at the time that Shaw was asked to exit his vehicle.

Specifically, the officer had observed a vehicle travel the shoulder of the highway for an unusual amount of time after his emergency equipment had been activated; he saw a rear seat passenger raise and then lower his head while following the vehicle and then appear to have been asleep when the officer approached the van; he was confronted by the driver who was without any identification; he noticed what appeared to be recent modifications to an older conversion van in an area of the vehicle where he had found a hidden hydraulic compartment in a similar vehicle four weeks prior; he smelled what he described as the overwhelming odor of air freshener coming from the vehicle; the driver appeared to change in mid-sentence as to where he was coming from and the reasons for his trip; he observed certain nervous characteristics about the driver, including a pounding of the carotid pulse in his neck and palpitations in his chest; upon questioning Defendant Shaw, he was given a different version as to where the Defendants were coming from and the reasons for their trip; and he noticed certain nervous characteristics about Shaw including a racing of the carotid artery, trembling of the hands and a twitching above and behind the right eye.

Any one of the observations made by Sgt. Lewis standing alone lacked a specific degree of reliability to justify the continued intrusion into the affairs and property of the Defendants. Arguably, any two or even perhaps more of the observations may not have been enough to satisfy Fourth Amendment concerns. Taken together, however, all of the observations when combined with this police officer's degree of training and experience were more than enough to constitute reasonable articulable suspicion and to justify the officer's actions and the continued detention of the Defendants. This Court believes that Sgt. Lewis had a substantial basis for

concluding as he did that criminal activity was present, accordingly, his actions were reasonable under the circumstances.

4.

Upon entering the van, Sgt. Lewis focused his attention on the ceiling above the driver and passenger area of the vehicle. He testified that he found the ceiling area to be hard with no flexibility consistent with the ceiling that he had encountered four weeks before which contained an after-marked-installed compartment with hydraulic pistons. Sgt. Lewis testified that he tried to pry down the area where the map lights were located, but could not budge it. He felt as though the area was permanently affixed with steel plates or steel rods. After retrieving his flashlight and reentering the van he tried to inspect the area beneath the map lights with no success. He exited the vehicle to get a screwdriver and returned only to be unsuccessful in his attempt to pry open any area in the ceiling. Sgt. Lewis went on to describe how the sound and feel of this particular van compared to others with which he had some familiarity. After making other observations regarding the construction of the ceiling area, Sgt. Lewis made the determination to restrain the Defendants. They were handcuffed and advised by Sgt. Lewis that he knew there was a hidden compartment.

After unsuccessfully attempting to get one or both Defendants to reveal the sequence of events necessary to open the hidden compartment, Sgt. Lewis began to tear open the ceiling area revealing a hydraulically controlled compartment in which heroin and cocaine were found. Defendants contend that the search conducted by Sgt. Lewis was unduly invasive, exceeded the consent offered by Shaw and was without probable cause. While the Court concurs that Sgt. Lewis'

search was substantially invasive, it disagrees that the search was without probable cause.

The Fourth Amendment permits the warrantless search of an automobile when there is probable cause to believe that the automobile contains contraband or evidence of criminal activity. While the search into Defendant's van was invasive, Sgt. Lewis was permitted to continue with the search because it was based on probable cause. A search based on probable cause "obviously may continue until the probable cause has dissipated or developed into confirmed facts indicating criminal activity." *Graham v. State,* 119 Md. App. 444, 459, 705 A.2d 82 (1998). In evaluating probable cause determinations, courts have looked to the totality of the circumstances. "We hold that a totality of the circumstances test applies to warrantless searches and seizures, just as it currently applies to searches based on a warrant." *See Potts v. State,* 300 Md. 567, 479 A.2d 1335 (1984). Likewise, courts look to the reasonableness of the police officer's probable cause decision, "it is clear that the task of the officer 'is simply to make a practical, common-sense decision whether given all the circumstances...there is a fair probability that contraband or evidence of a crime will be found in a particular place. Our duty as a reviewing court, is simply to ensure that the [officer] had a substantial basis for...conclud[ing] that probable cause existed.'" *Malcolm v. State,* 314 Md. 221, 550 A.2d 670 (1988), quoting *Illinois v. Gates,* 462 U.S. 213, 238-239 (1983).

Sgt. Lewis' observations in establishing reasonable articulable suspicion, his experience and training in dealing with hydraulically and electronically controlled equipment, the observations that he made with respect to the ceiling area of the Defendant's van, combined with the fact that only four weeks prior to this stop, he encountered a hidden compartment in a similar motor vehicle, constituted probable cause to believe that there was a fair probability that drugs or weapons were present

in the 1988 van owned by Defendant Shaw. Due weight should be given to the specific reasonable inferences which Sgt. Lewis was entitled to draw from the facts in light of his education, training and experiences. Under the totality of the circumstances, the continued detention of the Defendants and the invasive search of their motor vehicle was not unreasonable or inappropriate.

The Statement

1.

Defendant Nathan alleges that his statement at State Police Headquarters following his arrest "should not be considered because it was obtained by coercion, promises and not proper process under the rulings regarding 'Miranda' warnings." Nathan contends that Sgt. Lewis' statement to Nathan, near the end of the stop but before Sgt. Lewis had read Nathan his *Miranda* rights, had a coercive effect that could not be overcome by any subsequent waiver. Nathan also alleges that since the search and seizure that yielded the controlled dangerous substances was illegal, the statement obtained from Nathan was "fruit"[11] of an illegal act and thus inadmissable.

Nathan alleges that while seated in the police cruiser, he was coerced by the statement made by Sgt. Lewis that "now was the time to talk to us, so he could try to help himself, that – that I would be giving him an opportunity to talk, but first of all I wanted to advise him of his rights." Tr. at 95. After making the statement, Sgt. Lewis proceeded to advise Nathan of his *Miranda* rights and then Sgt. Lewis shut the door to the police cruiser and proceeded back to the van. Nathan was not asked any questions until over two hours later at Maryland State Police Barrack E. Sgt. Lewis was not involved in the

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[11] *Wong Sun v. United States*, 371 U.S. 471 (1963).

questioning at the barrack and before any questioning of Nathan took place he was presented with an Advice of Rights and Waiver Form. The Advise of Rights and Waiver Form completely advised Nathan of his *Miranda* rights and ensured that Nathan had not been promised anything, been offered any kind of reward or benefit, and was not threatened in any way in order to get him to make any statements.

"In *Hof v. State,* 337 Md. 581, 597, [the Court of Appeals] confirmed that a defendant's confession is admissible in a Maryland court only if it is '(1) voluntary under Maryland nonconstitutional law, (2) voluntary under the Due Process Clause of the Fourteenth Amendment to the Constitution and Article 22 of the Maryland Declaration of Rights, and (3) elicited in conformance with the mandates of Miranda' (quoting from *Hoey v. State,* 311 Md. 473, 480 (1988))." *Burch v. State,* 346 Md. 253, 265, 696 A.2d 443 (1997).

The basic standard governing the admissibility of an extrajudicial statement is whether, considering the totality of the circumstances, the statement was voluntary. *Clewis v. Texas,* 386 U.S. 707 (1967); *Taylor v. State,* 238 Md. 424, 209 A.2d 595 (1965); *McFadden v. State,* 1 Md. App. 511, 231 A.2d 910 (1967). To be voluntary, a statement cannot be "extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of improper influence." *Malloy v. Hogan,* 378 U.S. 1, 7 (1964).

The Maryland test for voluntariness was developed from common law principles. In *Biscoe v. State,* 67 Md. 6, 8 A. 571 (1887), the Court of Appeals enunciated the test governing the admissibility of confessions. The test is whether the statement was a free and voluntary confession, or whether it was procured by the influence of another under a hope of favor or advantage

if made, or fear of harm or disadvantage of some kind if withheld. *Id.* at 7.

Considering the totality of the circumstances, the Court believes that Nathan's statement was voluntary. Nathan looks to the statement made by Sgt. Lewis as having a coercive effect on him, but the Court is not persuaded that the statement was coercive. After Sgt. Lewis made the statement and before any questioning occurred, a time period of two hours elapsed and Nathan was advised of his rights on two separate occasions. During that two hour period, Nathan did not make any statements to Sgt. Lewis and Sgt. Lewis was not involved in the questioning. Nathan admitted at the motions hearing that he could read and write and had in fact read the Advice of Rights and Waiver Form and had initialed and signed the document. Tr. at 114-15. Nathan also testified that he read, understood and initialed by the third bullet on the document that which said, "have you been promised anything or have you been offered any kind of reward or benefit or have you been threatened in any way in order to get you to make a statement." Tr. at 115. Therefore, it is clear that the statement made by Sgt. Lewis was not coercive and the statement made by Nathan was freely and voluntarily given and is admissible.

The search and seizure in this case has been found to be a legal search so the statement obtained from Nathan is not a "fruit" of an illegal search and is admissible.

Conclusion

For the reasons stated previously herein, it is hereby **ORDERED** this 9th day of March, 2000, by the Circuit Court for Wicomico County, Maryland, that the Motions to Suppress filed by the Defendants Horace Shaw, Jr. and Corinthious James Nathan are **DENIED.**

/s/ Daniel M. Long
Daniel M. Long
Judge

APPENDIX D

STATE OF MARYLAND	)	In the Court of Appeals of Maryland
	)	
	)	Petition Docket No. 301
	)	September Term, 2001
v.	)	
	)	(No. 282,
	)	September Term, 2000
HORACE SHAW, JR.	)	Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals, the conditional cross-petition, the answer filed thereto, and the motion for injunction pending appeal, in the above entitled case, it is this 15th day of August, 2001

ORDERED, by the Court of Appeals of Maryland, that the petition and conditional cross-petition be, and they are hereby, granted, and a writ of certiorari to the Court of Special Appeals shall issue; and it is further

ORDERED, that the motion for injunction pending appeal be, and it is hereby, denied; and it is further

ORDERED, that said case shall be transferred to the regular docket as No. 61, September Term, 2001; and it is further

ORDERED, that counsel shall file briefs and printed record extract in accordance with Md. Rules 8-501 and 8-502, petitioner's brief and record extract to be filed on or before September 28, 2001; respondent's/cross-petitioner's brief to be filed on or before October 29, 2001; cross-respondent's brief to be filed on or before November 28, 2001, and it is further

ORDERED, that this case shall be set for argument during the January session of Court on the same day that *Corinthious James Nathan v. State of Maryland,* No. 42, September Term, 2001 is argued.

/s/ Robert M. Bell
Chief Judge

STATE OF MARYLAND	)	In The Court of Appeals of Maryland
	)	
	)	Petition Docket No. 301
	)	September Term, 2001
v.	)	
	)	(No. 282
	)	September Term, 2000
HORACE SHAW, JR.	)	Court of Special Appeals)

WRIT OF CERTIORARI

STATE OF MARYLAND, to wit:

TO THE HONORABLE THE JUDGES OF THE COURT OF SPECIAL APPEALS OF MARYLAND:

WHEREAS, *HORACE SHAW, JR. v. STATE OF MARYLAND,* No. 282, September Term, 2000 was pending before your Court and the Court of Appeals is willing that the record and proceedings therein be certified to it.

YOU ARE HEREBY COMMANDED TO HAVE THE RECORD TRANSMITTED TO THE COURT OF APPEALS OF MARYLAND ON OR BEFORE August 29, 2001, together with this writ, for the said Court to proceed thereon as justice may require.

WITNESS the Chief Judge of the Court of Appeals of Maryland this 15th day of August, 2001.

/s/ Alexander L. Cummings
Clerk
Court of Appeals of Maryland

APPENDIX E

STATE OF MARYLAND	)	In the Court of Appeals of Maryland
v.	)	No. 61
HORACE SHAW, JR.	)	September Term, 2001

ORDER

The Court having considered the motion to reconsider in the above-captioned case, it is this 8th day of October, 2002,

ORDERED, by the Court of Appeals of Maryland, that the motion to reconsider be, and it is hereby, DENIED.

/s/ IRMA S. RAKER
Judge Irma S. Raker

APPENDIX F

MEMORANDUM EXHIBIT A
(Outline of Joint Exhibit 1)

Traffic Stop by Sgt. Mike Lewis
Date: July 14, 1999
Time of Initial Stop: 20:15:50 (Military Time)

20:15:50 – Lewis initiates stop

20:16:00 – Lewis "the left one's out" [tail light]
[Lewis later attempts to use a bad tail light as one of the grounds for the original stop]

20:16:30 – Lewis' approaches passenger's side and asks for license and registration from Mr. Nathan. Lewis asks about passengers. Mr. Shaw moves to front of van. Lewis gets Shaw's ID.

20:17:30 – Lewis orders Nathan out of the van, tells Shaw to "sit tight, Mr. Shaw", and takes Nathan to guardrail in front of the cruiser.
[Shaw is now unlawfully "detained" as defined in *Ferris v. State*] [This is a second "stop" under *Ferris v. State* requiring independent articulable suspicion]

20:18:30 – Lewis has received Nathan's name, date of birth and social security number. Begins to interrogate Nathan about his trip.
[Lewis has all the information necessary to complete the traffic stop] [This interrogation is an additional "stop" under *Ferris v. State* requiring independent articulable suspicion]

20:19:25 – Lewis pats Nathan for weapons and returns to the van and interrogates Shaw about the trip.

[This interrogation is yet another "stop" under *Ferris v. State* requiring independent articulable suspicion]

20:20:33 – Lewis asks Shaw if he has any guns or drugs. Shaw says "No". Lewis: "We have a big problem with guns and drugs up and down this highway. I'm getting ready to get a bit to eat but I was going to check another vehicle real quick. Do you mind if I check the vehicle for guns and drugs real quick and I'll have you guys on your way. We check them all the time." Shaw says he doesn't mind

[Consent not voluntary because it is apparent to Shaw before he answers, that Lewis is going to search the van] [Lewis' words suggests to Shaw that he has the right to search without consent] *Bumper v. North Carolina,* 391 U.S. 543 (1968); *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). **[Shaw does not feel free to disregard the officer and object to the impending search]** *Florida v. Bostick,* 501 U.S. 429

20:20:50 – Lewis removes Shaw from the van, pats him for weapons. Shaw is unarmed. Shaw is detained by the guardrail and watched by Tfc. Penny is armed.

[Shaw is unlawfully "detained" constituting an additional "stop" as defined in *Ferris v. State*]

20:21:40 – Lewis enters the van and looks around for the first time.

20:22:20 – Lewis enters the van a second time with a flashlight. He is grunting and appears to be working on the overhead console.

[Lewis has exceeded the scope of consent by attempting to forcibly take out the console] *Florida v. Jimeno,* 500 U.S. 248 (1991)

20:23:00 – Returns to police cruiser to look for tools.

20:23:40 – Enters the van a third time with a screwdriver that he hid from the Defendants. He appears to be prying at the overhead console.

[Lewis has now exceeded the scope of consent in the amount of time he has searched as well as in the places to be searched] *Graham v. State,* 119 Md. App. 444 (1998)

20:24:20 – Lewis begins confirming the information over the radio regarding Shaw, Nathan and the van.

[Lewis confirms what could have been confirmed after speaking with Nathans]

20:25:50 – Lewis calls for backup and states "I believe something is definitely going on here."

[Lewis shows that he is simply playing a hunch without "articulable suspicion"] *Munafo v. State,* 105 Md. App. 662 (1995)

20:26:30 – Lewis tells Shaw and Nathan that the tags may be stolen and says he will put them in handcuffs until he confirms the van is not stolen. Lewis then says: "I know its not stolen, but you have a false compartment."

Lewis tells Shaw that he will tear it open with a crowbar if Shaw doesn't tell him how to get into the compartment. Shaw: "I don't know what you are talking about." Lewis to Trooper Penny: "Its just like the last one."

[Handcuffing amounts to an arrest without probable cause] *Bouldin v. State,* 276 Md. 511 (1976) (handcuffing equals arrest) **[No safety concerns for officers as both Defendants had already been patted for weapons]**

20:27:20 – Lewis approaches van, turns to Shaw and threatens to tear the van to pieces with a crowbar. Shaw: "I don't know about it."

[Shaw implicitly refuses to extend scope of consent to the tearing open of interior panels]

20:28:15 – Lewis enters the van a 4th time. He is grunting and appears to be working on the overhead console. He exits van and states "I am going to have to force it open."

20:30:00 – Lewis enters van a 5th time with a claw hammer. Lewis is heard grunting and tools clunking.

[Search is unsupported by a valid consent or probable cause]

20:31:40 – Trooper Penny joins Lewis in van. Lewis states with regard to the front overhead console, "I thought that it was the entrance but it's not." Lewis is now in the rear compartment and appears to working on the overhead panel.

[It is clear that Lewis's initial hunch as to a secret compartment was wrong]

20:32:00 – Lewis opens panel holding the television and finds drugs.

20:33:00 – Shaw and Nathan are placed under arrest. **[The Defendant were already arrested when handcuffed]** *Bouldin v. State,* 276 Md. 511 (1976)

20:34:53 – Lewis is in the van with a Trooper named "Scott" and states, "I ripped this out, but its not here." (Referring to the front overhead console)

20:36:00 – Lewis to "Scott", "I do want to put this back, I need to align these screws."

MEMORANDUM EXHIBIT B

SUMMARY OF 147 MARYLAND STATE POLICE FORM 130's FOR SGT. MIKE LEWIS

– **147** Detentions and Seizures by Sgt. Lewis from January of 1995 to September of 1999.

– Of **147** detentions and seizures **114 times** Sgt. Lewis relies on nervousness, lack of eye contact, inconsistent stories and/or carotid artery pulsing.

– Out **114 times** these factors were relied on, **84 times** no CDS recovered. Therefore, on only 30 occasions out of 114 times did the above factors lead to CDS being recovered. Therefore, **74% of the time the factors are inaccurate tests of criminality.**

– Of the **30 times CDS was recovered, on 16 occasions other clear indicators of criminality were present:**

* On 3 occasions, Sgt. Lewis smelled or saw marijuana.

* On 4 occasions, the driver had no valid license or was "wanted" (a detainer or warrant existed for the driver).

* On 1 occasion an occupant of the vehicle stopped was "wanted" (a detainer or warrant existed for the occupant).

* On 1 occasion the drive admitted guilt or criminality.

* On 1 occasion contraband was thrown from the vehicle.

* On 5 occasions there were rental car agreement violations (i.e., the driver not on the rental agreement or some other violation of rental contract. May mean vehicle stolen when not on rental agreement).

* On 1 occasion Lewis had informant information.

*** The Form 130s **only indicate one other hydraulically controlled secret compartment** (Form 130 dated June 9, 1999). This secret compartment contained only a gun. Other than the June 9, 1999, search, Sgt. Lewis's Form 130s fail to indicate any contraband ever being discovered in a ceiling of any vehicle.